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CASES CITED

TEXT BOOK, STATE STATUTES AND STATE CONSTITUTIONAL PROVISION CITED

OPINIONS OF LOWER COURTS

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

NO. 98

A. G. RISTY, ET AL., AS COUNTY COMMISSIONERS ET AL., APPELLANTS,

VS.

NORTHERN STATES POWER COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF APPELLEE

Northern States Power Company, plaintiff and appellee, filed its bill in the district court of the district of South Dakota, praying for an injunction. From a decree granting an injunction defendants and appellants appealed to the Circuit Court of Appeals of the Eighth Circuit, in which court the decree was affirmed. From the decision of the Circuit Court of Appeals defendants have appealed to this court.

This suit involves the constitutionality of the drainage ditch statutes of the state of South Dakota under both the federal and state constitutions, and also involves the regularity and validity of proceedings taken under the statutes. The facts out of which the suit arises are as follows:

STATEMENT OF THE CASE

The Big Sioux River flows from the north in a southerly direction west of the city of Sioux Falls to a point southwest of the city, thence easterly and thence northerly through the city to a point where it is intersected by the outlet of the drainage ditch or ditches in controversy. (For illustration, see Map, R. 225).

Appellee owns and operates an hydro-electric plant in the city of Sioux Falls operated partly by water power from the falls of the Big Sioux River and partly by steam power. This plant was constructed in the years 1907 and 1908 by its predecessor in interest, the Sioux Falls Light & Power Company, which company prior to the construction of the present plant owned and operated with the same water power, by means of a dam constructed some time prior to 1899, the electric plant formerly owned by the Cascade Milling Company. All of appellee's real property is of granite rock formation, the rock appearing at the surface of the ground without soil thereon, and no part of such property is or ever can be suitable for agricultural purposes. (R. 246-248).

In or about the years 1907 to 1909, appellant County Commissioners caused to be constructed what was then known as Drainage Ditch No. 1, having its origin at a point about three and one-half to four miles north of the city of Sioux Falls, and emptying into the Big Sioux River at a point north of and below appellee's hydro-electric plant. (R. 126-131, 245, 248).

While the proceedings for the construction of Drainage Ditch No. 1 were pending a petition was filed for the construction of what was first known as Ditch No. 2. Subsequently another petition was filed, seeking the extension of proposed Ditch No. 2, and praying that it be made a part of Ditch No. 1. Appellant County Commissioners finally, by resolution, established and caused to be constructed Drainage Ditch No. 2, having its origin at a point approximately fifteen miles north of the outlet of Ditch No. 1 on the east side of the Big Sioux River, and running thence in a southerly direction, intersecting the Big Sioux River at one point, and so close to the river at other points that the river subsequently cut into the ditch, and connecting with and emptying into Ditch No. 1 at its point of origin. (R. 131-138, 245).

Appellant County Commissioners, by resolution, determined that all of the property theretofore included within what they had determined to be the area of Drainage Ditch No. 1 was also benefited by Drainage Ditch No. 2; that the two ditches were mutually interdependent and should virtually be considered as one drainage system, and they assessed all of said property for the construction of both ditches. The system of drainage thus established was completed and paid for by assessment upon the property then deemed to be benefited which did not include any property lying south of the outlet of Ditch No. 1. No part of appellee's property or of the property of its predecessor in interest was included within the drainage area thus established; appellee was given no notice of any kind of the establishment of such drainage and no at-

tempt was made to include its property within the drainage area or assess it for any part of the cost of the drainage. (R. 127-129, 138-142).

As originally constructed, and after the connection of Drainage Ditches No. 1 and 2, the outlet of Drainage Ditch No. 1 consisted merely of a concrete apron hereinafter referred to as "spillway," extending from the lower terminus of Drainage Ditch No. 1 down over an abrupt slope to the Big Sioux River at a point below the falls of the river and as heretofore stated north of and below appellee's hydro-electric plant. In the year 1916, the volume of water passing through Ditches No. 1 and No. 2 washed out a portion of this concrete work with the result that the waters in the spillway were at that point uncontrolled and serious damage was threatened by the continued maintenance of the ditches in the absence of properly constructed works for the purpose of controlling and confining the waters at their outlet. It is conceded that with the ditches in the condition in which they were after the washing out of the spillway there was great danger that the Big Sioux River would be diverted from its course around the city of Sioux Falls and caused to flow through the ditches from the point of intersection some miles north of the city returning to the river at the point where the old spillway was located below the falls and below appellee's plant, thus threatening to seriously damage appellee's property, the water supply of the city of Sioux Falls, and many other properties and rights, and in fact, threatening to deprive appellee entirely of its water power. (R. 29-33).

It appears from the answer and the undisputed evidence that the appellant County Commissioners started work of some character to attempt to control the waters at the spillway and to prevent the threatened damage; that certain property owners within the area theretofore determined to be benefited by the drainage objected to this work and instituted suit in the state court to restrain the same; that thereafter a petiton was filed with the appellant County Commissioners seeking a change of the outlet of the Drainage Ditches No. 1 and No. 2 in such manner as to discharge the water from said ditches into what is known as Covell's Lake, situated in the northwesterly part of the city of Sioux Falls; that thereafter the owners of property within the drainage area as theretofore determined and the parties interested in the Covell's Lake project had numerous conferences with reference to the matter; that as a result of such conferences and as a compromise between said parties (there being no contention or proof that appellee was a party thereto) the proceedings held under the petition last referred to were abandoned and a petition known as the petition of F. L. Blackman and others was filed, which peti-

tion is entitled "Petition to Re-construct and improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by an assessment upon the property, persons and corporations benefitted thereby." Upon this petition, confessedly filed and acted upon by the appellant Commissioners as a compromise between the owners of property within the drainage area and the promoters of the so-called Covell's Lake project, and not including appellee, the appellant Commissioners adopted a resolution providing for its hearing and caused notice of said hearing to be published. Appellee was not named in said notice; its hydro-electric plant and water rights were not referred to, and no part of its property was described. It contained nothing which could be construed as giving any notice whatever to it that any claim would be made of benefit to its property or that any attempt would be made to assess its property in such proceeding. (R. 29-33, 39, 43-65).

Upon the return day of such notice, appellant Commissioners adopted a resolution puporting to re-establish Drainage Ditches No. 1 and No. 2 under the name of Drainage Ditch No. 1 and 2, along the exact course of their previous construction and for the re-construction of the outlet or spillway. (R. 33, 52-55, 263-267).

Purporting to act under this resolution, appellant Commissioners caused Ditches No. 1 and No. 2 to be cleaned and otherwise repaired and caused the outlet or spillway thereof to be re-constructed, and pursuant to a resolution or resolutions thereafter adopted, without any notice to appellee, caused certain portions of the Big Sioux River to be straightened. The spillway was re-constructed under the cost plus plan without advertising for bids for its re-construction in accordance with the plans finally adopted, and warrants were issued for the cost of such work amounting, with interest, to approximately $300,000.00. (R. 34-37).

The first intimation contained in the record of any thought of assessment of or attempt to assess any part of appellee's property appears in a notice published in April, 1919, (Plaintiff's Exhibit A, R. 142-194) said notice being of a hearing upon the matter of equalization of benefits resulting from said Drainage Ditch No. 1 and 2 and in which certain tracts of real property owned by appellee were described and attempted to be apportioned benefits to the extent of a very few units. Appellant Commissioners did not at that time, however, attempt to assess the hydro-electric plant or water rights of appellee and such plant and rights were not referred to in the April, 1919, notice. Proceedings under this notice were abandoned by the appellant Commissioners. (R. 194, 203.)

Subsequently and in or about the month of June, 1921, appellant Commissioners adopted a resolution apportioning the benefits derived from said Drainage Ditch No. 1 and 2 and apportioned to appellee and to its hydro-electric plant, dam, property rights, and water rights benefits to the extent of 5,351.63 units, amounting, as will appear from a mathematical calculation, to approximately $50,000.00. This suit was instituted for the purpose of restraining appellants from proceeding further with the equalization of said purported benefits and from spreading an assessment upon appellee's property therefor. (R. 17-20, 37, 194, 208).

DISTRICT COURT'S DECISION

(R. 80-100, 282 Fed. 364)

The District Court did not agree with appellee's contention that the drainage statutes of the state of South Dakota were violative of the Fourteenth Amendment to the Constitution of the United States in that they do not provide for proper notice to, and right to be heard of, property owners and deprive them of their rights and property without due process of law, but correctly held that it acquired jurisdiction not only by virtue of diversity of citizenship but because the bill involved a real and substantial question under the Constitution of the United States and therefore proceeded to determine all the questions, (*Davis, Director General v. Wallace* 257 U. S. 478; 66 L. ed. 325) and found, in substance, as follows:

(1) That the situation disclosed by the evidence "presented no question of the drainage of agricultural lands" but rather that of maintenance of ditches No. 1 and No. 2 "and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river;" that the drainage of the agricultural lands would not have been interfered with if the spillway had not been re-constructed; that the people who constructed Ditches No. 1 and No. 2 originally were responsible for the threatened damage, and it was their duty to maintain the ditch, "and to stop the ravages of the water cutting into it and through it;" that what was done under the pretense of proceeding under the so-called Blackman petition was merely to maintain the ditch or ditches originally constructed and that in the attempt to include additional lands in the drainage area and assess them any portion of the cost of such maintenance, appellant Commissioners were acting entirely without authority of law, there being no provision in the statutes of the state of South Dakota "for the taking in of any other lands and

assessing them for the maintaining of a ditch after it has been constructed and the benefits of its building have been assessed."

(2) That the forming of the so-called new ditch was simply a pretense and a subterfuge "resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed."

(3) That § 8489 of the South Dakota Revised Code, 1919, with reference to invalid and abandoned proceedings had no application, the proceedings for the construction of old Ditches No. 1 and No. 2 never having been held void, set aside or abandoned; and

(4) That the proceedings of the appellant Commissioners in "assuming the right to constitute a new drainage district, calling it district No. 1 and 2, and to assess benefits to the property of the plaintiffs in so far as they are located in the city of Sioux Falls," were void.

The District Court further found:

(5) That even if it had found that the alleged new drainage district had been legally constituted and that the appellant Commissioners had the right to extend the benefits to property outside the drainage area as originally established, appellee would still have been entitled to the relief sought because "the proofs overwhelmingly bring the plaintiffs within the rule recently expressed *In re Thomas, et al v. Kansas City Southern Railway Co., et al.*" (277 Fed. 708, affirmed by this Court, 261 U. S. 481, 67 L. ed. 758) "in that the taxation that is imposed upon each of the plaintiffs is a much higher rate and upon a different basis than the tax upon land lying within the district," stating:

> "Even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the board could be predicated. * * * The Northern States Power Company was assessed $50,000.00, one-fifth of the entire expense although there is included in the pretended district agricultural land something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in the city of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business. * * * Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if

the Board of County Commissioners had jurisdiction, *there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff.* The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion applies with special force to the status of this plaintiff that the *amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in value of its property as a result of this improvement.*" (Italics are ours.)

(6) That the re-construction of the spillway without change of location and the repair of the ditch etc., "could not be viewed in the same light or as serving the same purpose as the construction of the original ditches" because the object and purpose of such work was not to drain agricultural lands but to prevent the damage threatened because of the original imperfect construction of the ditches and spillway; in other words, to prevent the destruction of the water supply of the city of Sioux Falls, the water power of appellee, etc., by means of the agency set in motion by the original construction, and that although such object and purpose might have constituted a public use the appellant Commissioners were acting without authority of law because the applicable state constitutional provision was not self-executing and the acts of appellants lacked the necessary legislative authority.

DECISION OF CIRCUIT COURT OF APPEALS (292 Fed. 710)

The Circuit Court of Appeals did not pass upon the Federal constitutional questions involved because, although finding them "grave, serious and doubtful," it deemed their determination not necessary "to the solution of the case," but in other respects it approved the decision of the district court and affirmed the decree restraining the assessment of appellee's property lying outside the drainage area as originally established.

SUMMARY OF ARGUMENT

PROPOSITIONS RELIED UPON BY APPELLEE AS SUSTAINING THE JUDGMENT APPEALED FROM.

1. The South Dakota drainage ditch statutes are violative of the Fourteenth Amendment to the Constitution of the United States and deprive one of rights, and property without due process of law in that they provide for the taxation of

property without giving the owner thereof proper notice and the right to be heard upon the question as to the validity and amount of the tax and as to whether or not such tax is in excess of the benefit.

2. Such statutes are likewise violative of the Fourteenth Amendment to the Constitution of the United States because they do not afford to all persons the equal protection of the laws and deprive persons of their rights and property without due process of law, in that they prescribe no definite standard for determining benefits and are "of such a character that there is no reasonable presumption that substantial justice generally will be done but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred." (*Kansas City Southern Ry. Co. v. Road Imp. Dist No. 6*, 256 U. S. 658, 65 L. ed. 1151.)

3. In this instance the application and administration of the laws in question by appellant Commissioners have been so arbitrary, discriminatory, and extensively oppressive as to result, if not restrained, in depriving appellee of its property without due process of law, and in depriving it of the equal protection of the laws in violation of the Fourteenth Amendment.

4. Appellant Commissioners in attempting to include appellee's property within the drainage area and assess it, acted without any authority of law, attempted in excess of their powers to create a burden upon appellee and a cloud upon the title to its property, and proceeded without right to do something not authorized by the law under which they purported to act, this being true for the following reasons:

(a) Because what they did constituted merely maintenance and repair of the ditches as originally constructed, and the statutes do not purport to give them any power or authority to enlarge the drainage district and assess for that purpose property not originally assessed, the maintenance statute clearly providing that assessments for maintenance and repairs shall be made upon the property and in the proportions originally assessed.

(b) Because the purported establishment of a new drainage ditch in the exact location of the old ditches and construction of a new spillway in the location of the old spillway was confessedly a mere scheme or subterfuge resorted to by appellant Commissioners for the purpose of enabling them to lessen the burden upon the property owners in the original drainage area, and to cast the greater part of it upon property owners not included within the drainage area or benefited by the drainage.

(c) Because it clearly appears from the record that the work for which the assessment is sought to be made, unless

it be treated as the repair and maintenance of the original ditches, was done, not for the purpose of draining agricultural land, but for the purpose of preventing damage to property that was threatened by the existence of the drainage theretofore established, and appellant Commissioners were not authorized by any law of the state of South Dakota to establish a drainage district or assess property for the cost of the accomplishment of any such object or purpose.

(d) No part of appellee's property sought to be assessed is or ever can be agricultural land. The law in question does not purport to authorize the assessment of any property other than agricultural land and the property of railroad companies.

5. It clearly appears from the record that appellee's property has derived no benefit whatever from the so-called drainage, the benefits sought to be charged to it being purely fanciful, speculative, arbitrary and out of all proportion to those sought to be charged to other properties, and not being benefits directly or indirectly derived from the drainage of agricultural lands.

ARGUMENT

I.

THE SOUTH DAKOTA DRAINAGE LAWS ARE VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellee contended in the lower courts and still contends that the statutes under which appellant Commissioners claim to have proceeded are in conflict with the Fourteenth Amendment to the Constitution of the United States and therefore void in that their enforcement will deprive persons of property without due process of law and deny to them the equal protection of the laws.

This is true because: the statutes provide no proper method for the organization of a drainage district; they do not provide for any determination that the cost of the proposed drainage will not exceed the benefit to be derived; they do not afford property owners the right to be heard at any time or place, before any tribunal, upon the questions as to whether or not such cost will exceed the benefit, as to whether or not their lands and property shall be included within the drainage district, and as to the amount and validity of the tax to be assessed against their property.

It must be conceded that when a legislature, for any purpose within its powers, creates a taxing district and provides that the property in such district under certain designated rules of procedure shall be assessed for the cost of certain pub-

lic work, such legislative determination is conclusive upon the question as to whether or not the property included within such district will be benefited by the improvement provided for and, with certain modifications hereinafter referred to, as to whether or not such benefit will be less than the cost, and upon such questions property owners would have no right to be heard, but the rule is different when such a determination is delegated by the legislature to a subordinate body. In that event, property owners are entitled to notice and hearing upon those questions.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763-768.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. ed. 369-394.

Road Improvement District No. 2 v. Missouri Pacific R. Co., 275 Fed. 600.

The conclusion reached by the District Court that due process of law is afforded, provided an opportunity to be heard with reference to the amount of the tax is given the land owner before the assessment becomes a lien upon his property, is not applicable to the situation presented by this record, because in the state of South Dakota there has been no legislative declaration or finding as to the limits of the districts to be taxed for the purpose of, or with reference to the benefits to be derived by any property or district from, drainage.

This Court in *Fallbrook Irrigation District v. Bradley, supra*, stated the correct applicability of the rule announced in *Paulson v. Portland*, 149 U. S. 30-41, 37 L. ed. 637-641, cited by the District Court in support of its conclusion, saying:

> "It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits for the purpose of assessing upon the lands within the district the cost of a local public improvement. The legislature when it fixes the district itself is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e. the amount of the tax which he is to pay. *Paulson v. Portland*, 149 U. S. 30-41 (37: 637-641). But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited and the decision of that question is submitted to some tribunal (the board of supervisors in this case) the parties whose lands are those included in the petition are entitled to a hearing upon the

question of benefits and to have the land excluded if the judgment of the board be against their being benefited. *Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken.*" (Italics are ours)

The court also recognized the distinction sought to be made, in *Spencer v. Merchant, supra,* saying:

"When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.

In *Road Improvement District No. 2 v. Missouri Pacific R. Co., supra,* the Circuit Court of Appeals for the Eighth Circuit said:

"But in the case in hand the legislature did not undertake itself to make the assessment on the property in this district, but it delegated that power to and imposed that duty upon the board of the district. And when the legislature delegates to a board or to commissioners the determination of the question what lands will be benefited, or what the amount of benefits to such lands will be, the inquiry becomes in its nature, judicial, in such a sense that property owners are entitled to a hearing, or an opportunity to be heard, after notice, before these questions are determined."

It is, therefore, only when there has been legislative determination as to benefits, in which the determination that the benefits equal or exceed the cost is necessarily involved, that the property owner's right to be heard is limited to the question as to the proportional amount and the validity of his tax. In all cases where the authority to determine such questions is delegated by the legislature to another body, jurisdiction cannot attach in such subordinate body unless the property owner, by requirment of the delegating statute, is given notice of and an opportunity to be heard upon the question of whether or not his property is or can be benefited by the improvement to an extent equal to or exceeding the cost thereof.

A statute without such a provision fails to afford due process of law and is void.

As stated by the District Court, the South Dakota drainage statutes differ from those of most other states in that they make no provision "for the organization, at the inception of the proceedings, of a drainage district with boundaries defined, organized after notice to all property owners within the district, and endowed by statute with certain powers consistent with the purpose for which the district is organized," and that no opportunity is given the property owner to be heard upon the question as to whether or not the benefits will equal or exceed the cost and as to whether or not the particular lands of the owner shall be included within the drainage district. It is because of the omission of these essential requirements that the statutes are unconstitutional.

By a constitutional provision of the state of South Dakota, hereinafter more specifically referred to, the drainage of agricultural lands is declared to be a public purpose and the legislature is authorized to provide therefor and to vest the corporate authorities of counties with power to construct drains "by special assessments upon the property benefited thereby according to benefits received." (State Constitution §6, Article XXI.)

The legislature enacted certain drainage laws, those applicable to this proceeding being found in §§ 8458 to 8491 of the South Dakota Revised Code, 1919, but in so doing merely attempted to delegate some of its powers to the county commissioners, and established certain rules of procedure. The constitutionality of these laws must be determined by the following excerpts from them, which excerpts contain all the provisions applicable to the questions under discussion and are here set out for the convenience of the court.

> § 8458. *Power of County Commissioners.* The board of county commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural lands.
>
> § 8459. *Petition.* Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in

whole or in part, and a general statement of the territory likely to be affected thereby. * * Such petition may be presented at any regular or special meeting of the board and, if sufficient in form, shall be ordered filed with the county auditor.

§ 8460. *Inspection of Proposed Route.* It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners, shall as soon as practicable inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and assessment of its cost, or as much less as the board may require. * * *

§ 8461. *Surveyor's Report—Notice of Hearing.* The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition, and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceeding for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compen-

sation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing.

§ 8462. *Hearing on Petition.* At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. * * * When the board of county commissioners shall have fully heard and considered such petition and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition. * * * If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimant's right to have the same assessed by a jury. Such drain shall be given a name and the proceedings thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office.

§ 8463. *Equalization of Benefits.* After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once in each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of

the office of the register of deeds, at the date of the filing of the petition, and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed.

§ 8464. *Assessments.* After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. * * * At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same will be so filed, by publication at least once in each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due, and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest

from the date of the order of the assessment at six per cent per annum payable annually. * * * Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale. * * * The provisions of chapters 7, 8, 9, part 9 of this title shall apply to the enforcement of the lien of drainage assesments so far as such provisions are applicable * * *. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at six per cent per annum, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and costs of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage.

§ 8467. *Assessments for Further Costs.* At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain, and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessment and certificates. The board of county commissioners may sell such assessment certificates at not less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants, only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the

county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage.

§ 8469. *Appeals.* An appeal shall lie from any final order or determination of the board of county commissioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage, to the circuit court of the county in which such drainage is located, by any one deeming himself aggrieved by any such order or determination. * * * Upon an appeal from an assessment of benefits, the court or jury shall consider not only the relative benefits to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not and, if benefited, to what extent.

§ 8474. *Further Powers of Board.* Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as to all lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly

It is clearly apparent from the foregoing statutes that the legislature has attempted to vest in the county commissioners the power to establish and construct a system of drainage without first doing any of the following things:

Creating and defining the boundaries of a drainage district;

Determining the approximate probable cost of the work;

Determining that the benefit to the property to be included within the district and assessed for the cost of the work will equal or exceed such cost.

The only finding the commissioners are required to make before proceeding with the work is that "the drainage pro-

posed or any variation thereof" is "conducive to the public health, convenience or welfare or necessary or practicable for draining agricultural lands" (§ 8462 South Dakota Revised Code). Upon such determination alone they are authorized to proceed, *without limit as to cost*, and fully complete the work without any notice whatever to property owners or any right given to property owners to be heard at any stage of the proceedings thereafter until the hearing provided for by § 8463, South Dakota Revised Code, upon the equalization of benefits.

Certainly such a proceeding cannot be held to constitute due process of law. A fundamental prerequisite necessary to the validity of a special assessment for benefits must be the determination that such benefits will equal or exceed the cost.

Village of Norwood v. Baker, 172 U. S. 269; 43 L. ed. 443.

Such question not having been determined by the legislature, due process of law demanded that the subordinate body to whom the entire matter of drainage construction and control was attempted to be delegated, should have been required to determine it and that such determination be made only after due notice and an opportunity to be heard given to all property owners whose property would eventually be subject to assessment. There is certainly as much reason for this as for the requirement that a property owner be heard upon the question as to whether or not his property was actually benefited.

It cannot be contended that it was the legislative intent that the commisioners, in determining whether or not the proposed drainage would be "practicable", should base such determination upon the relation of cost to benefit, because § 8460, *supra*, authorizes them to act upon a preliminary survey made merely for the purpose of aiding the board in determining the necessity of the proposed drainage, leaving it discretionary with them as to whether or not "a complete survey such as will be required for the construction of the proposed drainage and *assessment of its cost*" shall be made. In other words the statute purports to authorize the commissioners to establish the drainage without first determining either its cost or the resultant benefits. (Italics are ours)

It will be observed that the statutes provide for but two notices of hearing: that of hearing upon the original petition and surveyor's report in § 8461, and that upon the equalization of benefits in § 8463. The hearing provided for by § 8461 is merely, as we have stated, upon the sole question (exclusive of the question of damage in which we are not interested) as to whether or not the proposed drainage will be

conducive to the public health, convenience or welfare or necessary or practicable for draining agricultural lands.

The jurisdiction of the county commissioners over any particular piece of property, if acquired at all, must be acquired by virtue of the notice provided for in § 8461. The pertinent requirements of that notice are that it "shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass, and give the names of the owners thereof * * * Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established or constructed."

In the instant case, pursuant to this statute, the notice appearing in the record on pages 56-65, inclusive, was published. Appellee was not named in said notice nor its property described, nor was anything contained in the notice from which it might possibly infer that it was in any manner affected by the proceeding.

In this connection it is interesting to note that there is no evidence "that the tract of country likely to be affected by the establishment and construction of the said proposed drainage" described in general terms in the notice was selected or determined upon by any action of the board of commissioners. The resolution providing for the hearing (R. 51, 52), merely provides that notice be given "in accordance with" the statutes. This is followed by a purported resolution establishing the drainage (R. 52-55) and the only record we find having any reference to the tract of country "likely to be affected" is in the notice itself which never appears to have been acted upon by the board.

As to persons claiming damages to their property or compensation for the taking of it, the notice is sufficient as it describes the land through which the drainage is to pass and names the owners thereof. It may be fair to assume that all persons to whom such notice is given know whether or not they have a claim for damages but as to persons who are not named, whose property is not so described, and who may be affected by the proposed drainage, we contend that no adequate notice—no notice that would constitute due process of law—is given.

How can persons owning land some miles removed from the drainage ditch or parties such as appellee owning a hydro-electric plant situated upon rocky and non-agricultural land, know that in the judgment of the board their properties were or would be affected by the drainage? The statute does not require the naming of such persons but in general terms requires the notice to be addressed to all persons affected. Such

notice assumes that the persons affected either have been determined by the board or else it places upon such persons the making of that determination at their peril.

But for what purpose are they summoned before the board? Not that they may show that their property is not affected but that they may show cause why the drainage should not be established and constructed. They are not by this language given the opportunity to show cause why their property should not be included in the drainage area. If such persons are directed to show that their property is not benefited at all, the statute gives such permission to the persons affected only for the purpose of opposing the establishment and construction of the ditch.

If one owned a piece of land not agricultural in character and utterly impossible of being made agricultural land, not subject to overflow, and of such character that it would be impossible for water to collect or stand thereon, and such land were located on the river bank and some distance away from the drainage project, it would seem to be utterly absurd that a notice in the words of the statute should be binding on him so that if he failed to appear and contest the establishment and construction of the ditch his land would be subject to an assessment for benefits therefrom. If he did appear and contest the esablishment of the ditch, he would be told, in all probability, that his objection only went to the amount of benefits to be assessed against his property and would have to be urged at a subsequent hearing. But he would be in the drainage area and the ditch would be established as to him and as to his property. We do not believe that jurisdiction for such purpose could be obtained in that manner; yet that is exactly what is claimed in this case by appellants.

The only further notice provided for is that of hearing upon equalization of benefits (§ 8463). This hearing may be had at any time after the establishment of the drainage and the fixing of the damages and either before or after the completion of the work. In the instant case no notice of it was given until the work was completed. At this hearing nothing is determined except the proper apportionment of the benefits as between the various parties claimed to have been affected. The question as to the amount of the tax and its validity is not involved. Whether or not the total cost of the work is in excess of the total benefits is not a relevant question and is not determined. The only question at issue is whether or not the proportion of benefits theretofore fixed by the commissioners constitutes a fair distribution of the cost of the improvement as between the various properties.

Under this statute the commissioners proceed to determine what they think is the actual benefit to a tract of land,

calling such tract a unit. They then proceed to determine what they think is the actual benefit to all other tracts. Each of the amounts so arrived at is divided by the amount of the benefit to the unit and each tract is assessed the number of units ascertained as the quotient. It is readily apparent that in this proceeding the cost and therefore the actual amount of the assessment is not involved. The cost per unit may be many times the benefit per unit. Upon that question there is no hearing at any stage of the drainage proceedings. If this constitutes due process of law we submit that the term has become meaningless and that the constitution has lost its power to protect.

In *Martin v. District of Columbia*, 205 U. S. 135; 51 L. ed. 743, the statute under consideration required a jury to apportion the cost of a local improvement "according as each lot or part of land in such square may be benefited by the opening, widening, extending, or straightening of such alley." The court sustained the constitutionality of the act but sustained it only because it permitted "the interpretation that in any event the apportionment is to be limited to the benefit." The court said: "We think it apparent as was assumed by the court of appeals that the jury understood their duty to be to divide the whole cost among the landowners whether the benefit was equal to their share of the cost or not. It must be admitted that the language of the statute more or less lent itself to that understanding. * * * For this reason, the assessment must be quashed." The language of the South Dakota statute is quite different. It (§ 8464) provides that "after the equalization of the proportion of benefits the board may make an assessment against each tract or property affected in *proportion to the benefits as equalized*, for the purpose of paying the damages and the cost of establishment."

This language admits of but one interpretation when it is considered in connection with the provisions of § 8463. It clearly requires the board of county commissioners to first determine the proportion of actual benefits and then to assess the entire cost in such proportion. The question of whether or not the cost exceeds the benefits is never determined and has no effect whatever upon the assessment under the South Dakota statutes.

The further points relied upon in questioning the Federal constitutionality of the South Dakota drainage laws, and the constitutionality of the proceedings in this case are:

The statutes prescribe "no definite standard for determining benefits from proposed improvements;"

They are "of such a character that there is no reasonable presumption that substantial justice generally will be done but the probability is that the parties will be taxed disproportion-

ately to each other and to the benefit conferred," and

That their application and administration in this case have been so arbitrary, discriminatory and extensively oppressive as to result, if not restrained, in depriving appellee of its property without due process of law and in depriving it of the equal protection of the laws.

These propositions, which may be considered together, are supported by the following Federal decisions:

Gast Realty & Inv. Co. v. Schneider Granite Co., 240 U. S. 55: 60 L. ed. 523.

Kansas City Southern Ry. Co. v. Road Improvement District Number 6, 256 U. S. 658; 65 L. ed. 1151.

Yick Wo. v. Hopkins, 118 U. S. 356; 30 L. ed. 220.

Road Improvement District No. 2 v. Missouri Pacific Railroad Co. (C. C. A.) 275 Fed. 600, 604.

Village of Norwood v. Baker, 172 U. S. 269; 43 L. ed. 443.

Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478; 60 L. ed. 392.

Abernathy v. Fidelity Nat. Bank & Trust Co. (D. C.) 274 Fed. 801.

Thomas v. Kansas City Southern Railway (C. C. A.) 277 Fed. 708 (affirmed by the Supreme Court, 261 U. S. 481; 67 L. ed. 758).

Board of Directors v. Pipe Line Co. 292 Fed. 474.

Thornton v. Road Imp. Dist. No. 1 (C. C. A.) 291 Fed. 518.

We deem it unnecessary to discuss the principles stated or quote further from the authorities cited in their support.

The important question is that of the application of these authorities to the South Dakota statutes and the acts of the commissioners as shown by this record.

So far as the statutes are concerned they prescribe absolutely no standard or rule for determining benefits. The county commissioners are simply told by the legislature to fix the proportion of benefits among the lands affected and that "benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed." (§ 8463, South Dakota Revised Code, 1919).

The statute of itself, however, is discriminatory in that it requires the county commissioners to fix with reference to "lands affected" the "proportion of benefits" and with reference to the property of railroad companies "the benefits." In the one case thus requiring the determination of a relative benefit and in the other of an actual benefit. If the benefits

should materially exceed the cost, the result of the discrimination would be most obvious.

In this connection, it is desired that the court have in mind the fact that no provision is made in § 8463 or any other part of the law for the fixing of benefits to and assessment of any property such as appellee's hydro-electric plant and water rights, and the appellant Commissioners in attempting to assess them have acted entirely without any color of right or authority. The statute was amended in this respect, in 1921, but the amendment was not in force at the time of the proceedings here complained of.

It is our contention that the law is unconstitutional because it fixes no standard or method for the determination of benefits; that its operation naturally results in the use of arbitrary and discriminatory measures, and that "there is no reasonable presumption that substantial justice generally will be done."

This contention is sustained by the conduct of the appellant Commissioners in this case. It clearly appears from the record that Drainage Ditches No. 1 and No. 2 were completely established, put in operation, and paid for several years prior to the institution of the proceedings here complained of, by assessment of the property then deemed to be benefited thereby and thus included within their drainage area, *no part of appellee's property being then thought to be affected;* that after all this had been done and while these ditches were presumably performing the function for which they had been constructed they became out of repair, the spillway or outlet washed out, and because the Big Sioux River forms what might be called a horse-shoe bend around the city of Sioux Falls, the opening end of the horse-shoe being connected by the drainage ditches, there was great danger after the washing out of the spillway, that the entire course of the river would be diverted from its channel through the cut-off of the ditch, thus destroying the water supply of the city of Sioux Falls, and the water power of the appellee and causing much other great damage; and the appellant Commissioners were naturally forced to the conclusion that something must be done—not to take care of the drainage, there being no evidence that it was being interfered with—but to prevent the machinery which they had set in motion for drainage purposes from destroying the rights and property of those not responsible for its existence. It likewise conclusively appears from the answer of the appellant Commissioners that the owners of property within the drainage area became much exercised, that various meetings were held, and that finally, pursuant to an agreement among such property owners and as a compromise measure, proceedings were started which result-

ed in the pretended establishment over exactly the same line as the ditches then constructed, of a new ditch to be known as Drainage Ditch No. 1 and 2. It is apparent that this aptly termed "subterfuge" was resorted to for the sole and only purpose of attempting to lay a foundation which would permit appellant Commissioners to assess the owners of the property and rights, the destruction of which was threatened by the existence of the then drainage project, a great proportion of the cost of the work necessary to be done in order to avoid the threatened injury, and thus lessen the burden upon the property owners responsible in the first instance for the drainage and who confessedly planned the scheme which the appellant Commissioners adopted "as a compromise."

It is evident that the entire proceeding was in bad faith, possibly not intentionally so upon the part of the commissioners, but so in fact. The proceedings of the commissioners were purely arbitrary and discriminatory.

All this of course has nothing to do with the method of assessment of proportion of benefits, but the appellant Commissioners proceeded to attempt to perform their alleged duties in that respect in the same arbitrary and discriminatory manner.

The evidence is conclusive that appellee owns no agricultural land which is sought to be assessed. The appellant Commissioners, pursuant to their scheme to aid the property owners up the river and already included in the drainage district, concluded that some plan should be worked out by which appellee might be compelled to pay approximately $50,000.00, or one-sixth of the cost of the entire work. Their imaginations not being sufficiently fertile, to enable them to visualize benefit to a water power plant by diverting water therefrom, they employed an engineer who finally reached the bald conclusion that because the ditch, operating as a river cut-off or flood water by-pass, might in flood time divert a portion of the flood waters of the river and prevent the portion thus diverted from running through appellee's wheels and into its tail race, and thus prevent its head from being lowered and its power thereby diminished, appellee was greatly benefited; and without any fixed basis for calculation, the appellant Commissioners, upon the report of the engineer, arbitrarily decided that appellee was benefited approximately $50,000.00, taking into consideration not only the theory of the engineer above stated but the alleged fact that appellee received some benefit because of a dam that the record shows had been constructed for the sole purpose of preventing the river from continuing to flow into the ditch and thus depriving appellee of the water power to which it was entitled. (R. 199-201, 206, 290, 291).

The situation thus created was bad enough. If the $50,-

000.00 sum, which the appellant Commissioners and the engineer, Rettinghouse, guessed at as approximately the value of appellee's benefits, had been divided by $25.00, the value of the benefit to the one acre unit, as testified to by the witness Risty, chairman of the appellant Commissioners (R. 199, 207, 208) the result of course would have been 2000 units, but the number of units actually apportioned to appellee as disclosed by Exhibit C (R. 19) is 5351.63.

Exhibit B attached to the complaint (R. 17) is admitted in the answer to be "an analysis of the resume or deduction drawn from the facts set out in the (engineer's) report, merely for the purpose of showing the results shown by the proportion of benefits recommended." It appears from Exhibit B, as well as from a mathematical calculation based upon the approximate cost of the work at the time and the number of units involved, that each of the 5351.63 units thus arbitrarily charged to appellee represents in money at least $9.50, the sum total of the charge against appellee's property being $50,840.49. Bearing in mind the fact that the value of the benefit to the one acre unit was determined to be $25.00, and that the actual charge against that unit, as the cost of producing the benefit, was $9.50, it is apparent that there has been no attempt to apportion benefits to appellee's property upon the same basis as that used in making the apportionment with reference to agricultural lands. Upon that basis, appellee's property, in order to warrant an apportionment of 5351.63 units to it, and an assessment of approximately $50,000.00, must have been actually benefited to the extent of $133,790.75, instead of approximately $50,000.00 as claimed.

On the other hand, if the total benefit to the appellee was approximately $50,000, then its proportion of the cost of the improvement would be approximately $19,000, being the ratio of $9.50, actual cost per unit to $25.00, actual benefit per unit.

Just how the appellant Commissioners arrived at the number of units apportioned to appellee is not shown by the record except by inference. The inference, however, is obvious and is that instead of attempting to determine how much, if any, appellee's property was benefited, appellant Commissioners arbitrarily concluded that it should pay approximately $50,000.00, amounting, as appears from Exhibit B (R. 17), to 16.5 per cent of the entire cost of the work, and fixed the units accordingly.

The mere recital of the foregoing is sufficient to disclose the arbitrary and discriminatory character of these proceedings, especially in view of the fact that the engineer employed admitted that he was not a hydro-electric engineer; that he did not know the capacity of the ditch except that he assumed that it was some 2600 to 3000 cubic feet per second; that he

did not know its capacity at the point where it was taking the waters out of the river; that he did not know how much of the water discharged by the ditch at the outlet was flood water, and how much was water drained from adjacent lands; in short, he admitted that he knew no facts whatever upon which to base his opinion with reference to the amount of the benefits. As to the probable increase of the head, it was based entirely upon the unwarranted and unsupported assumption that the ditch at flood times would carry 3000 cubic feet per second of the flood waters of the Big Sioux River, and so divert that amount of water that would not pass over appellee's dam and through its tail race. (R. 293, 294.)

The record, however, furnishes further conclusive proof that the appellant Commissioners in these proceedings were not acting pursuant to any definite standard for determining benefits. In March, 1919, they passed a resolution attempting to fix the proportion of benefits from the same work now under consideration and published a notice (Plaintiff's Exhibit A, R. 143-194). This proceeding was subsequently abandoned because of certain defects but it is of value in comparison with the proportion of benefits made in 1921 for approximately the same work, as illustrating the manner in which the law was attempted to be applied and as throwing light upon the query as to whether or not the attempted application of the law was arbitrary and discriminatory.

The chairman of the appellant board of county commissioners testified that the commissioners adopted the same method of determining the benefits in 1919 that they did in 1921 (R. 198). He further testified that he was not certain whether the approximate cost of each unit used in 1919 was $80.00 to $85.00 or $7.00 to $8.00 per acre, although in fairness to him as well as to the court we state that it appears from the record that the then unit was a ten-acre tract and as then used probably represented, as may be determined by a mathematical calculation, an approximate cost of about $80.00.

A comparison of the two resolutions, without other evidence, furnishes, as we have said, conclusive proof of the speculative and arbitrary application of the law. The proportion of benefits assessed to each of the railroad companies mentioned in the 1919 apportionment was several times less than its apportionment for the same benefit in 1921. In 1919 it appears from the notice in evidence (Plaintiff's Exhibit A, R. 143-194) that the assessment of the various railway companies then considered to be benefited was made purely upon a mileage basis; the mileage of each company is given in the notice and the several proportions of benefits assessed bear the same proportion to each other as the mileage of each com-

pany bears to that of the other. In arriving at the proportion of benefits for the same work two years later, it conclusively appears that the mileage was given very little consideration. In the proportion of benefits attempted to be made in 1919, the track, right of way, and bridges of the Great Northern Railway Company and the hydro-electric plant and water rights of the Northern States Power Company were given no consideration whatsoever, although now an attempt is made to proportion benefits to the Great Northern Railway Company to the amount of approximately $5,800.00, and to the Northern States Power Company, as we have said, to the amount of approximately $50,000.00.

If substantial justice was done in 1919, it certainly was not done in 1921, and if done in 1921, it was not done under the law as applied in 1919. The conclusion must necessarily follow and scarcely bears stating that the method employed for ascertaining the benefits was so speculative and arbitrary as, if not restrained, to deprive appellee of its property without due process of law and deny it the equal protection of the laws. The District Court was fully justified in reaching the following conclusion:

> "Referring to the testimony showing the manner of making assessments and the amount, in a general way: I think it fairly appears from the record in the case that the contention of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefited. Even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the Board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands. The plaintiff, Chicago, Rock Island & Pacific Railway Company, is simply arbitrarily assessed Eight Thousand Dollars, in raising a total of Three Hundred Thousand Dollars. The Northern States Power Company was assessed Fifty Thousand Dollars, one-fifth of the entire expense although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in

the City of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business.

"The injury that was to be remedied by this improvement was one that had been caused by Drainage Ditch No. 1 and Drainage Ditch No. 2, one that could not have existed but for the establishment of those ditches. The duty to maintain these ditches involved the duty to repair the break from the banks of the river and the duty to prevent the taking of the water from the river, that would or should, naturally flow therein to plaintiff's benefit.

"Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if the Board of County Commissioners had jurisdiction, there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff. The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion applies with special force to the status of this plaintiff that the amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in the value of its property as a result of this improvement."

II

THE PROCEEDINGS OF APPELLANT COMMISSIONERS COMPLAINED OF AND SOUGHT TO BE RESTRAINED WERE NOT AUTHORIZED BY THE STATE LAW AND CONSTITUTED THE EXERCISE BY THEM OF PRETENDED AUTHORITY AND POWERS NOT VESTED IN THEM BY ANY STATUTE OF THE STATE.

This involves the consideration of the following questions: whether such proceedings were not a mere subterfuge for the purpose of attempting to force appellee and others whose property was not within the original drainage area to bear a large portion of the expense of maintaining and repairing the ditches already constructed; whether such proceedings were valid proceedings resulting in the establishment of new drainage; whether the work done under them was but the necessary work for the repair and maintenance of the ditches already constructed; whether if the proceedings were in good faith for the purpose of establishing a new ditch the actual purpose was drainage or some other public use; and whether in any event appellee's hydro-electric plant and water rights are subject to assessment. These various propositions are somewhat interwoven and will be treated together.

There is ample ground for the finding of the District Court that the situation existing in 1916 presented no question of the drainage of agricultural lands; that it presented no question other than the duty of the appellant Commissioners to maintain and repair the ditches theretofore constructed; that the attempted formation of the new ditch "was simply a pretense and that the plaintiff's pleading that it was a subterfuge is supported by the proofs, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed."

It is not necesasry even to resort to the evidence to sustain these findings. The answer of appellant Commissioners is sufficient of itself. We refer particularly to paragraphs Ninth and Tenth (R., 29-33) and to the following allegation contained in paragraph Eight of the so-called affirmative defense: "and (defendants) further allege that the original petition for said drainage ditch, river cut-offs and spillway hereinbefore mentioned was a compromise between said petitioners therefor and others affected thereby as hereinbefore set forth" (R., 39).

The pleading that the proceedings were had "with the consent and aquiescence of this plaintiff" is not supported by any evidence.

The answer shows the situation to be exactly what we claim. The ditches had been constructed; they had become filled with mud and sand; the spillway had proven imperfect and inadequate; it had washed out with the result that there was imminent danger of the waters in the ditch, unless the spillway should be repaired and the waters properly controlled, causing great damage to property and rights outside the drainage area; appellant Commissioners at once commenced work to control the waters; certain property owners within the drainage area instituted an action to restrain them; these property owners conferred and as a result of such conferences a proceeding was commenced for the purpose of abandoning the spillway and establishing a new outlet connecting with what is know as Covell's Lake; further conferences were held resulting in an agreement that the Covell's Lake proceeding should be abandoned (and, as admitted by appellants in their answer *"the same were abandoned accordingly"*) and resulting in the further agreement "that a new petition should be filed and new proceedings instituted *for the re-establishment of said Drainage Ditches No. 1 and No. 2 and the re-construction and improvement thereof* and the re-establishment and the re-construction of the outlet to said ditches and for the establishment and construction of a new spillway to *properly control and take care of the waters flow-*

ing through said drainage ditches and for the enlargement of said drainage district," and that thereafter *"and in accordance with said agreement"* the petition, which is the alleged foundation for the proceedings in question, was filed as a "compromise between the said petitioners therefor and others affected thereby."

In view of the situation thus pleaded and also clearly shown by the evidence, the commissioners had but one duty. That was to proceed to repair and maintain the ditches, already constructed, so that they might continue to perform their functions without damage to property outside the area. They should have proceeded under § 8470, South Dakota Revised Code, 1919, which is as follows:

> "For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners.

Under this section the cost should have been assessed and assessments made "upon the landowners affected in the proportion determined for such drainage." This was the only power the commissioners had.

There is no provision in the South Dakota statutes for extending the boundaries of a drainage area once determined and assessed, but it is contended that the proceedings were pursuant to the provisions of § 8489, South Dakota Revised Code, 1919, having reference to "Invalid or Abandoned Proceedings." Such contention is not tenable because the evidence clearly shows that the original proceedings had not been "enjoined, vacated, set aside, declared void, dismissed, or voluntarily abandoned." There was no pretense of abandoning the old ditches. It is claimed that the spillway was abandoned by the resolution adopted in the so-called "Covell's Lake" proceeding. Even if this were true it did not operate as an abandonment of the ditches, and appellants allege in their answer that the entire Covell's Lake proceeding was agreed to be abandoned and *was abandoned*. The withdrawal of the Covell's Lake proposition left the original ditches in existence,

unaffected by these abandoned proceedings.

The District Court was fully justified in its conclusions as follows:

"When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the Commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

"Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had assumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these ditches, and because of the inefficient manner in which they had constructed the ditches and built the spillway, and all of these dangers were threatened, therefore, the plaintiffs' and others in Sioux Falls were necessarily to be damaged. And, although a proper maintenance of these two ditches, No. 1 and No. 2, would stop the damage, would prevent any danger, the Commisioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words, they then began to look around and see what they would do in the way of taking care of the water and stopping these dangers.

"At first it was proposed to change the spillway and conduct the water down in a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city.

"This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment

in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the Spillway. That they filed a petition which was headed, 'To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by asessment upon the property, persons and corporations benefited thereby.'

"This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate substantial spillway, and prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

"Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this Ditch No. 1 and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down through the bluffs of the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefited. Instead of charging the repairs and maintenance of the ditches to those who were responsible for their construction under the provisions of the statutes above referred to, the Commissioners proceeded to assume the right and authority to constitute a new drainage ditch without the abandonment of the old ditches, with no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed with no thought or purpose except to repair the damage that had already been done, and prevent future damage.

"Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch

after it has been constructed, and the benefits of its building have been assessed.

"I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiff's pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

"I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as existed here. That section has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid on the old ditch, and give credit for any payment made upon the old ditch by people benefited. No such proceeding was attempted to be followed in this case. The proceedings establishing old ditches No. 1 and No. 2 have never been held void, never been set aside, never been abandoned. They are in force today and are responsible for the manner in which the ditches were constructed and the damages that result from their negligence.

"Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and maintainence of said ditches against the property of the various plaintiffs. They were mere tresspassers, for the reason that no drainage Ditch No. 1 and 2 was ever established and has no existence.

"I am of the opinion that the proceedings of the Board of Commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the city of Sioux Falls, are void."

The Circuit Court of Appeals, in its opinion in this case, quoted with distinct and emphatic approval the last two preceding paragraphs. (*Risty v. C. R. I. & P. Ry. Co.* 297 Fed. 710).

If it be contended that the new proceedings constituted anything more than the necessary maintenance and repair of the ditches then it must conclusively appear that such purpose or purposes consisted of the by-passing of the flood waters of

the Big Sioux River through the cut-off created by the ditch properly repaired and maintained and of preventing the threatened damage to the water supply of the city of Sioux Falls, appellee's water power, etc., and if this be true appellant Commissioners acted without authority or color of right because § 6 of Article XXI of the South Dakota State Constitution authorizing the drainage of lands "for any public use" has never been made effective by appropriate legislation.

This section is as follows: "The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and *may provide for the organization of drainage districts for the drainage of lands for any public use and may vest the corporate authorities thereof, and* the corporate authorities of counties, townships, and municipalities with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state by special assessments upon the property benefited thereby according to benefits received." (Italics are ours).

The dual nature of this constitutional provision should be carefully observed. It first declares the drainage of agricultural lands to be a public purpose and that the legislature may provide therefor, and then declares that the legislature may also "provide *for the organization of drainage districts* for the drainage of lands for any public use." It is clear that the term "drainage districts" as so used contemplates a drainage district so organized as to constitute a corporate entity because the constitutional provision under consideration further provides for the vesting of certain powers in "the corporate authorities thereof."

It may be that the constitution authorizes provision to be made for the drainage of agricultural lands without the establishment of corporate drainage districts but it must be conceded that for the drainage of land for any other public purpose or use the legislature must first provide for drainage districts in such manner as to constitute such districts corporate entities, having corporate authorities who might be vested with the power to construct the drainage. There having been no such legislation, the only provision of the constitution that the legislature has attempted to make operative is that referring to the drainage of agricultural lands, and insofar as the ditches and spillway under consideration were constructed or purported to have been constructed for any purpose other than the drainage of agricultural lands, they were so constructed without any warrant of law whatsoever, and the entire proceeding is void under the State Constitution.

In construing this section of the state constitution, the Circuit Court of Appeals said: "We are satisfied that under

the South Dakota Constitution, section 6, art. 21, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes." (*Risty v. C. R. I. & P. Ry. Co.*, 297 Fed. 710, 717.)

III.

THE SOUTH DAKOTA DRAINAGE STATUTES DO NOT PURPORT TO AUTHORIZE THE ASSESSMENT OF PROPERTY SUCH AS APPELLEE'S HYDRO-ELECTRIC PLANT AND WATER RIGHTS FOR THE PURPOSE OF DRAINING AGRICULTURAL LANDS.

In this connection we ask the court to carefully consider and analyze § 8463 of the Revised Code of 1919, hereinbefore quoted. It requires the county commissioners to proceed as follows:

(a) After the establishment of the drainage and fixing of damages, to "fix the proportion of benefits of the proposed drainage *among the lands affected*, and to appoint a time and place for equalizing the same;"

(b) To give notice of such proportion of benefits and equalization of benefits by publication and posting;

(c) To state in the notice the route and width of the drainage, "a description of *each tract of land affected*," and the names of the owners of the "*several tracts of land*," and the proportion of benefits "*for each tract of property*," and to notify "*all such owners*" to show cause why the proportion of benefits shall not be fixed.

The foregoing is all that this section requires the county commissioners to do with reference to the question of equalization of benefits prior to the hearing. They are required to give notice only to the owners of each tract of land affected by the proposed drainage.

The section then further provides that upon the hearing, without any provision whatever for notice, the benefits (not the proportion of benefits) "which any railroad company may obtain for its property by such construction" and the proportion of benefits which any county, city, town or township may so obtain "shall be fixed and equalized *together with the proportion of benefits to tracts of land*."

It will be observed that no reference is made to any class of property except tracts of land, the highways of municipal corporations, and the property of railroad com-

panies, and that there is not included in the language of the statute anything which might possibly be construed to refer to property such as an hydro-electric plant or water rights; certainly neither is a "tract of land" or "tract of property" in the sense used in the statute. The word "tract" must be given significance, and could have no application at all used in connection with hydro-electric plants or water rights. It should further be borne in mind that the attempt here is to assess appellee because of the benefit not to any land it owns, but rather because of the fanciful claim that the operation of appellee's machinery and hydro-electric apparatus through the use of its water power will be rendered more efficient by the assumed by-passing of the flood waters through the ditch. This is neither a direct nor indirect benefit to a tract of land or a tract of property resulting from the drainage of agricultural lands.

It will further be observed that the statute provides for the giving of no notice except to "such owners" of the "several tracts of land."

In this connection, it will be of interest to note that the fact that § 8463, Revised Code, did not provide for the apportionment of benefits to property similar to that of appellee here sought to be affected has received legislative consideration.

§ 8463 was amended in the year 1921, the amendment becoming effective July 1st, 1921 (Chapter 194 South Dakota Session Laws 1921).

We quote the portion of the statute as amended relevant to the question under consideration, italicizing the new matter:

> "The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company *or other corporation or property owner* may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land."

Here is a clear recognition by the legislature that the phrase "tract of land" was not intended to include, and did not include property, such as is sought to be assessed in this proceeding.

It is quite evident from the addition of the words "or other corporation or property owner" that the legislature deemed such addition necessary in order to include property other than agricultural lands.

The statute, as so amended, is sufficiently comprehensive to include all classes of property, but if the amendment had been in force at the time of the proceedings here in

question, appellee, with reference to the question of notice and right to be heard, would be in the same position as railroad companies in that the statute, as hereinbefore suggested, does not purport to require notice of hearing upon the question of equalization of benefits to be given to anyone other than the owner of a tract of land, but upon the hearing requires the *"benefits"* to railroad companies, and other property owners to be "fixed and equalized together with the *proportion of benefits* to tracts of land."

IV.

APPELLEE'S PROPERTY HAS RECEIVED AND CAN RECEIVE NO BENEFIT EITHER DIRECT OR INDIRECT FROM THE SO-CALLED DRAINAGE.

The arbitrary, fanciful and speculative method resorted to by appellant Commissioners in determining that appellee's property was benefited has been discussed. The District Court's conclusion that it was not benefited at all is fully sustained by the record. Certainly it cannot be charged that benefit resulted from the construction of a dam built to prevent the water from the Big Sioux River from being diverted into the ditch and built because appellee objected to the diminishing of its water power because of such diversion (R., 283). The conclusions of the engineer Rettinghouse have no force because of his admission that he had absolutely no knowledge of the facts upon which he based his estimates and conclusions, and there being no proof in the record of the existence of such facts.

It appears from the uncontradicted testimony of the witness Link (R., 250-256) and from that of the witness Reed (R., 246-248) that appellee's plant was designed and constructed in such manner as to fully protect it from damage by any flood conditions, and that if the plant were to be re-constructed good engineering would not permit any consideration of the drainage ditch and spillway in designing it.

Further than this, even if the operation of appellee's plant might be rendered more efficient because of the by-passing of the flood waters of the river (which the record shows is not the fact) such benefit would not be a benefit derived directly or indirectly from the drainage of agricultural lands, and would not be an assessable benefit under the South Dakota statutes.

It certainly would not be a direct benefit. It is not contended that any of appellee's land is drained by the ditch. It is not contended that appellee received any benefit from the drainage of any other lands, the contention being simply

that the means resorted to for the drainage of agricultural lands benefits appellee by increasing the efficiency of its plant.

The statutory definition of benefits in force at the time of this proceeding was as follows: (§ 8463).

> "Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed."

There is no contention that appellee is benefited "by virtue of such drainage being an outlet for connection drains that may be subsequently constructed," and such was the only indirect benefit for which the statute authorized the making of assessments in this proceeding.

The limitation thus placed upon "indirect benefits" received legislative consideration in the year 1921, § 8463 of the Revised Code having then been amended, the amendment becoming effective July 1st, 1921, and in no manner affecting this proceeding other than evidencing the legislative recognition of the necessity for the additional legislation.

The above definition of "indirect benefits" was amended in 1921 (Chapter 194 South Dakota Session Laws 1921) by the addition of the following language:

> "Indirect benefits accruing because of such drainage being an outlet for connection drains that have heretofore or may be hereafter constructed *or due to its improving public health, convenience or welfare* may be assessed against any drainage district, county or political subdivision affected thereby as a whole at the option of the board of county commissioners." (Italics are ours.)

It is apparent from this amendment that it is and has been the legislative interpretation and conclusion that direct benefits are only those benefits resulting directly to the owner of land from its drainage and not those to persons other than the owners of agricultural land because of a benefit other than drainage resulting from the operation of the drainage system.

V.

THE AUTHORITIES CITED BY APPELLANTS AND THE ARGUMENT MADE BY THEM IN SUPPORT OF THEIR CONTENTION THAT THE TRIAL COURT WAS WITHOUT JURISDICTION AND THAT THIS ACTION WAS PREMATURELY BROUGHT ARE NOT APPLICABLE TO THIS CASE.

If this action were one merely to restrain the enforcement and collection of a tax or special assessment, levied by a tribunal having power and jurisdiction to make such levy, and based upon some irregularity in the proceedings of such tribunal or involving only a dispute as to the amount of the tax many of appellant's contentions would be well founded.

But such is not the situation. A tribunal claimed to be acting beyond its jurisdiction and therefore without power passed a resolution attempting to proportion benefits to appellee which, as will appear from a mere mathematical computation, would result in the levying of taxes upon appellee's property to the amount of approximately $50,000.00; appellee was ordered to show cause before this tribunal why such tax should not be spread upon its property; appellee was not only threatened with the levying of such a tax but with the further and possibly more dangerous situation—that of having its property included within a drainage district, resulting in the extreme probability of its becoming involved in a project threatening to cause great and irreparable damage to property interests. The suggestion that under such circumstances it must first submit itself for a final determination of the questions involved to the tribunal having no jurisdiction, acting as it claims arbitrarily and without due process of law, we think has never received and never will receive the sanction of any court.

It has uniformly been held that courts of equity will intervene to prevent damage threatened by the acts of public tribunals beyond their jurisdiction and in excess of their powers. Mr. Justice Field recognized this in *Crampton v. Zabriskie*, 11 Otto 601; 25 L. ed. 1070, saying:

> "And from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax payers of a county to prevent the consummation of a wrong when the officers of those corporations assume in excess of their powers to create burdens upon prop-

erty holders. * * * The courts may be safely trusted to prevent the abuse of process in such cases."

The court acquired jurisdiction by virtue both of diversity of citizenship and the constitutional question involved. The amount in controversy cannot be questioned. Appellee is threatened with an assessment amounting to approximately $50,000.00, and its property will be so assessed upon its failure to show cause, before a tribunal having no power or jurisdiction, why a levy of that amount should not be spread. In addition to this is the great and irreparable damage that appellee is threatened with by having its property included within the drainage area. The action was not prematurely brought because appellee had the right at the time it instituted this action to have determined by a court of equity the question as to whether or not the appellant Commissioners were acting beyond their jurisdiction and without power, and whether their proceedings would result in depriving appellee of its property without due process of law.

It is asserted that appellee had a complete and adequate remedy at law but the remedy suggested is that appellee appear before the Board of County Commissioners and if dissatisfied appeal to the state courts. Such is not an adequate remedy. The remedy at law must be a remedy on the law side of the Federal court, not a remedy in the state courts of South Dakota.

Chapter 3, Simkins "A Federal Equity Suit."

United States Life Insurance Co. v. Cable, 39 C. C. A. 264.

We quote from the case last cited:

"It must, we think be conceded that the bill in this case alleges facts constituting a good cause of action in equity for the cancellation of the policy, unless the plaintiff has a full and adequate remedy at law for the same cause. A suit at law has been commenced in the state court of Illinois to recover upon the policy, and if it be an adequate remedy at law to turn the plaintiff over for litigation of its right in the state court under the circumstances set out in the bill, then the United States Circuit Court in equity should disclaim jurisdiction. But there are two reasons why we think the remedy thus open to the plaintiff, of having its rights determined in an action at law, does not meet the requirements of the rule: The first is that the plaintiff being a citizen of New York, and the defendant a citizen of Illinois, the plaintiff, under the constitution, has the right to come to the federal court for an adjudication. For a person entitled to litigate in the feder-

al court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights. * * * The remedy at law, in order to defeat the right to proceed in equity, should be full and adequate. It should be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. * * * In the federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in the state courts, but only to the law side of the federal court."

The authorities cited in support of the contention that this suit was prematurely brought are easily distinguishable and their non-applicability is apparent.

We find it difficult, in the manner in which the brief of appellants is prepared, to locate all the authorities on which they rely as to any particular point and particularly as to the one now under consideration, but we call attention to the following cases cited by them, which are typical and which clearly demonstrate the fallacy of their position.

In *Western Union Telegraph Company v. Howe* (C. C. A.) 180 Fed. 44, there was no question of the jurisdiction of the taxing tribunal, and the court said: "The effect of an injunction would be to take away from the tax commission all powers of discretion and judgment in arriving at a fixed and proper valuation."

The contention here and the question that this court must decide is whether or not the tribunal assuming to levy the tax has any power whatsoever.

In *Keokuk & Hamilton Bridge Company v. Salm*, 258 U. S. 122, 66 L. ed. 496, there was again no question as to the jurisdiction or power of the taxing tribunal, and the court said:

> "*Before the suit was begun it had been decided that the taxing statute was valid; that the property was subject to taxation;* that it was assessable as real estate, and that the assessment should be made as was done by the county assessor and not by the state board of equalization. *The amount of the tax payable was, therefore, the only matter in controversy.*" (Italics are ours.)

In *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, 67 L. ed. 1194, chiefly relied upon by appellants, there was again no question of jurisdiction of the taxing body. Plaintiff's property there in question was included within a taxing district by the state legislature. The court said:

> "It is well settled, however, that if a proposed improvement is one which the state has authority to make

and pay for by assessments on property benefited the legislature in the exercise of the taxing power has authority to determine by the statute imposing the tax what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the courts and cannot be assailed under the Fourteenth Amendment *unless it is wholly unwarranted and a flagrant abuse and by its arbitrary character is mere confiscation of the particular property.* * * * *The legislature not only provided for the assessment of the lands within the district but specifically declared that the tunnel established was of special benefit to such lands, and that the special benefits accruing to them are in excess of the cost of the tunnel and of the assessment provided for against them.*" (Italics are ours.)

Again we find no question as to the jurisdiction or power of the taxing body.

Although appellee bases its contention that this suit was not prematurely brought principally upon the claim that appellant commissioners acted entirely without jurisdiction, we believe, even if we should concede for the sake of argument that the law is constitutional; that appellant commissioners acted pursuant to its provisions up to the time of adopting the resolution fixing the apportionment of benefits; that jurisdiction was obtained to form the so-called drainage district, and that appellee's property if benefited might be included within the boundaries thereof, it would still follow that the commissioners did not in fact acquire jurisdiction over appellee and its property because the basis upon which they acted in attempting to affect appellee's property was so arbitrary, speculative and discriminatory as to deny due process of law.

The record in this case clearly discloses that appellant commissioners never at any time had before them any evidence showing or tending to show that appellee's property would be benefited at all by the construction of the so-called Drainage Ditch No. 1 and 2. This being true it must follow that their action in adopting the resolution apportioning the benefits, so far as appellee is concerned, was based upon no foundation in fact and was therefore merely arbitrary and furnishes no jurisdictional basis for requiring appellee to appear before the appellant board and show cause why such tentative assessment should not be made permanent.

IN CONCLUSION

Appellants rely chiefly upon the decision of the state court in the case of *Gilseth v. Risty*, 46 S. D. 374, 193 N. W.

132. The opinion in that case discloses the following situation: The constitutionality of the drainage laws was not in question; plaintiff was the owner of agricultural land within the drainage area of Drainage Ditches No. 1 and No. 2 as originally constructed; he was a party to the conferences alleged in this case to have taken place between the parties interested in the original ditch proceedings and which resulted in the filing of the petition "For the Re-establishment of Drainage Ditches No. 1 and 2;" he was present at the hearing upon that petition and took no appeal from the order of the commissioners purporting to establish the new drainage; his property, as we have said, was in the drainage area as originally established; he was one of the parties responsible for the original construction of the ditches in question and for their proper maintenance, and one of the parties for whose benefit appellant commissioners are attempting to assess appellee's property and that of others outside the original drainage area.

The court simply held that as to him, a party to the proceeding, the order establishing the drainage and subsequent orders from which he did not appeal became final. A careful analysis of the opinion discloses that the court finally based its conclusion upon questions of estoppel and lack of equity in favor of plaintiff. After reciting the situation practically as above stated, it said: "Appellant having stood by and seen all the work performed without protest, and having received all the benefits that could result therefrom, should not now be permitted to escape payment for the same. The relief asked by appellant is equitable in its nature but, because of the circumstances above shown, all the equities of the case are against appellant and in favor of the Board."

The situation in the instant case is obviously vastly different. No part of appellee's property was within the drainage area of Ditches No. 1 and No. 2, as originally established; appellee took no part in the proceedings here in question; it owns no agricultural land and has received and will receive no benefits from the work no matter what the purpose of it may have been. The plaintiff in the *Gilseth* case was one of the persons responsible for the existence of the ditches in the first instance, and, as the facts are disclosed by the state court's opinion, his property should be assessed for the cost of the work done for the purpose of preventing the threatened damage, regardless of whether or not such work was done under the guise of a new drainage proceeding.

The state court has never had before it for determination the question as to whether or not the drainage stat-

utes, in so far as they purport to authorize drainage proceedings for any purpose other than draining agricultural lands, are violative of the state constitution. In all cases in which the constitutionality of the statutes has been passed upon by that court, the only questions involved were those with reference to the drainage of agricultural lands, and the court very correctly held that such drainage might be provided for without the incorporation of drainage districts.

We confidently maintain not only that the conclusions of the District Court upon which its judgment was based and those of the Circuit Court of Appeals expressed in affirmance thereof are fully sustained by the record but that the judgment appealed from is also sustained because the South Dakota drainage statutes are violative of the Fourteenth Amendment to the Constitution of the United States in the particulars hereinbefore urged.

Respectfully submitted,

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Brief For Respondent on Petition For Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 99

A. G. RISTY, ET AL, AS COUNTY COMMISSIONERS ETC. ET AL, PETITIONERS,

vs.

CITY OF SIOUX FALLS, SOUTH DAKOTA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CHARLES O. BAILEY,
ROY D. BURNS,
J. H. VOORHEES,
T. M. BAILEY,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 455

A. G. RISTY, ET AL., AS COUNTY COMMISSIONERS ETC. ET AL, PETITIONERS,

vs.

CITY OF SIOUX FALLS, SOUTH DAKOTA, RESPONDENT.

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

The City of Sioux Falls, South Dakota, plaintiff in the District Court and respondent in this Court, brought its bill in the District Court for the District of South Dakota against A. G. Risty and others, as County Commissioners of Minnehaha county, South Dakota, defendants, praying for an injunction restraining the making of an assessment upon the property of respondent for the cost of the construction of certain drainage works. The holders of warrants issued in payment of expenses incurred in the drainage project became interveners in the suit. A decree was entered in the District Court in favor of the plaintiff in that Court and respondent in this Court, (282 Fed. 364). From this decree the defendants and the interveners in the District Court appealed to the Circuit Court of Appeals for the Eighth Circuit in which Court the decree of the District Court was affirmed (297 Fed. 710). The defendants and interveners in the District Court, appellants in the Circuit Court of Appeals, have taken an appeal to this Court and have also, as petitioners, filed in this Court their petition for a writ of certiorari.

The main ground upon which petitioners ask that this Court grant a writ of certiorari is that a conflict has arisen between the decisions of the Circuit Court of Appeals for the Eighth Circuit and the decisions of the Supreme Court of the State of South Dakota in a matter relating to the construction of a statute of the state of South Dakota; and petitioners pray for the granting of a writ of certiorari upon the strength of *Forsyth vs Hammond*, 166 U. S. 506.

Our reply to the contention of petitioners is that no conflict exists between the decision of the Circuit Court of Appeals in this case and the decisions of the Supreme Court of South Dakota.

This case involves the construction of the drainage ditch statute of South Dakota. In the Circuit Court of Appeals this statute was attacked by respondent as unconstitutional. The Circuit Court of Appeals deemed it unnecessary to pass upon this contention but decided the case upon the ground that the proceedings, had under the statute in the instance of the particular drainage project under consideration, were irregular.

In *Gilseth vs Risty*, 46 S. D. 374, the Supreme Court of South Dakota rendered a decision in a case between other parties, but involving the same drainage project. The records in the two cases were entirely different and the Supreme Court of South Dakota held that the plaintiff in the case before it was estopped by his own laches from complaining of irregularities in the proceedings. There was in that case no conflict with the holding of the Circuit Court of Appeals in the present case.

In none of the other South Dakota cases cited by counsel for petitioners is there involved the drainage ditch project in controversy in the present case or any of the questions involved in the present case which were resolved by the Circuit Court of Appeals in favor of respondent.

For the foregoing reasons we submit that no showing is made whereby a writ of certiorari should be issued under *Forsyth vs Hammond*, 166 U. S. 506.

The remaining points raised by counsel for petitioners are, we believe, best answered by the opinion of JUDGE KENYON in the Circuit Court of Appeals. We, therefore, append a copy of this opinion to this brief as being the most apt reply which we can make to the contentions of counsel for petitioners.

Respectfully Submitted,

CHARLES O. BAILEY,
ROY D. BURNS,
J. H. VOORHEES,
T. M. BAILEY,
Counsel for Respondent.

(297 FEDERAL REPORTER, 710)

A. G. RISTY, *et al*, as
County Commissioners, etc., *et al*,

vs.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY,
(*and five other cases*)

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

MARCH 18, 1924

OPINION OF THE COURT

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suits, by the Chicago, Rock Island & Pacific Railway Company, by the Chicago, Milwaukee & St. Paul Railway Company, by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, by the Northern States Power Company, by the City of Sioux Falls, and by the Great Northern Railway Company, respectively, against A. G. Risty and others, as County Commissioners, and others. From decrees for plaintiffs (282 Fed. 364) the defendants in each case appeal. Affirmed.

In the year 1907 the board of county commissioners of Minnehaha county, S. D., acting under the drainage statutes of that state, established and had constructed a drainage ditch known as drainage ditch No. 1, bottom width of 40 feet, at an expense of $46,600. This ditch was north of Sioux Falls and ran first in a southerly direction from its initial point; thence easterly past the pumping station of the city of Sioux Falls; thence southeasterly about 1,000 feet to the Big Sioux river near the north limits of Sioux Falls. It passed through a ridge and descended approximately 100 feet in the terminal thousand feet. A spillway was constructed to carry the water down the descent. This ditch was approximately three miles in length, and there was a spur 670 feet long extending northwest into a bayou about 2,000 feet south of the initial point.

In 1910 the board of county commissioners established another drainage ditch known as drainage ditch No. 2, which extended north from the northern terminal of drainage ditch No. 1, for a distance of about 12 miles. This ditch likewise had a 40-foot bottom and was constructed at a cost of $81,106.19. These two ditches, making in fact one continuous ditch, drained certain agricultural lands, and traversed the land north of the city of Sioux Falls near the gravel bed from which the city obtained its water supply. It also passed near the state penitentiary lands and emptied into the Big Sioux river north of the falls in said river.

In the year 1916 there was a breaking of the river through the natural barrier into the bayou drained by the lateral branch. This, coupled with the large volume of water passing through these ditches, made it impossible for the spillway to carry the same, and it was washed out and destroyed. The waters therefore being uncontrolled descended from the steep bluff to the level of the Big Sioux river, and serious damage was threatened to various interests. There was danger that the Big Sioux river which flowed through the city of Sioux Falls would be diverted from its course and flow through these ditches cutting off the water supply of the city of Sioux Falls, injuring the Northern States Power Company, and depriving it of its water power.

The board of county commissioners attempted to devise some plan to reconstruct the spillway and to protect these various interests from the threatened damages.

April 8, 1916, certain parties filed a petition with the board of county commissioners asking that that portion of drainage ditch No. 1 containing the old spillway be closed and abandoned, and the course of said ditch extended in a southerly direction through Covell's Lake to the Big Sioux river; and said board did pass a resolution that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof.

August 3, 1916, a petition of F. L. Blackman and other parties was filed entitled, "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property Persons and Corporations Benefited Thereby." This petition was transmitted by the board to the state engineer, and on August 14, 1916, a survey was ordered.

September 13, 1916, a report of the survey was made and filed by the engineer in charge. A resolution was thereupon adopted by the board fixing the line and width of said new proposed ditch in the exact location of old ditches No. 1 and No. 2, and providing for the time and place of hearing the petition. Notice was published for three successive weeks describing the route of the proposed drainage, and the tract of country likely to be affected thereby, in the general terms provided by the statute; also, the separate tracts of land through which the proposed ditch would pass, and the names of the owners of said tracts. Such notice informed all persons affected by the proposed drainage to appear at such hearing and show cause why the same should not be established. Upon the return date of the notice the commissioners adopted a resolution purporting to establish the so-called drainage ditch No. 1 and 2, and providing for the reconstruction of the spillway.

No appeal was taken from this order establishing the purported new project.

The commissioners then caused ditches No. 1 and No. 2 to be cleaned out, widened, deepened, and diked so as to increase the carrying capacity; caused the spillway to be reconstructed, and

certain portions of the Big Sioux river to be straightened. This work cost approximately $255,000, and drainage warrants were issued to be paid out of taxes assessed against the property determined to be benefited within the area of the purported new drainage ditch No. 1 and 2. The largest holders of these warrants are interveners in this action.

In April, 1919, notice was published of a hearing upon the matter of equalizing benefits resulting from said drainage ditch No. 1 and 2, and this was the first intimation that certain of appellees had that benefits might be assessed against them. The property of some of the appellees was not covered by the notice. However, the proceedings under this notice were abandoned.

June 10, 1921, appellant board by resolution fixed a proportion of benefits in units, which had been decided upon as a fair method of arriving at the same, on drainage ditch No. 1 and 2, and designated Monday August 1, 1921, at the office of the county auditor, as the time and place for hearing on the question of equalizing benefits, and caused notice of such hearing to be published as provided by the statute. Under the unit system adopted by the board upon recommendation of their engineer, the various appellees had units allotted against them as follows:

Chicago, Rock Island & Pacific Railway Company, out of a total of 32,569.62 units, 839.45.

Chicago, Milwaukee & St. Paul Railway Company, 1,681.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, 839.45.

Northern States Power Company, 5,351.63.

Great Northern Railway, 613.85.

City of Sioux Falls, 3,147.95.

The amount due on warrants issued for this work at the time the actions were brought was about $300,000. The total units of benefit aggregate 32,549.62, so each unit of benefit amounts to slightly in excess of $9. If no changes had been made by the board, had they been permitted to proceed; the amounts charged against various appellees would have ranged from $50,000 against the Northern States Power Company to substantially $6,000 against the Great Northern Railway Company.

Appellees brought suit to restrain appellants from proceeding further with the equalization of said purported benefits and from levying any assessment upon their property to pay therefor. Some of the appellees had no property in original ditch district No. 1 and No. 2; others of appellees did have, and some difference is made in the contention of those not having property in the original ditch district and those who did have, but the issues in the main were the same as to all the parties.

All of the appellees contended in the trial court that the South Dakota drainage law was unconstitutional, violating the Fourteenth Amendment to the Constitution of the United States; that it also violated sections 2 and 3 of article 6 of the Constitution of the State of South Dakota. Some of the appellees contended

that the board exceeded its powers in what it attempted to do, in that the same was not for the drainage of agricultural lands, but being for other public purposes, could only be carried on by the corporate authority of drainage district entities established for that purpose, which had not been done, and that consequently the proceedings were void.

Others of the appellees contended that the proceeding seeking to establish drainage ditch No. 1 and 2 was a subterfuge to impose liability on new territory to pay for the maintenance of the former ditches, and that the proceedings were for maintenance and repair of the old drainage ditch and were not carried on as provided by section 8470 of the Code of South Dakota relating to assessments for the maintenance of drainage already established; that drainage ditch No. 1 and 2 was not a new ditch and not a new enterprise.

Further claim is made by the railroad appellees that the South Dakota drainage law is unconstitutional so far as respects assessments of railroad property, in that it provides for the giving of notice whatever of the apportionment and equalization of benefits to railroad companies.

All appellees claim that the attempted assessments upon their property are arbitrary, unjust and illegal, and constitute a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law; and that the proceedings create a cloud upon their title.

It was the position of appellants, on the other hand, that the statutes referred to were constitutional; that the federal court in equity had no jurisdiction because there was a complete remedy at law; that there was no equitable question involved; no irreparable injury shown; no facts sufficiently pleaded to show any threatened cloud upon title; that the amount involved was not sufficient to give jurisdiction; that the bringing of the suit was premature; that ditch No. 1 and 2 was legally established as a new drainage project under the statute of South Dakota; and that the board of county commissioners had full jurisdiction to do each and every act which they performed.

The trial court held that section 8461 of the Reversed Statutes of South Dakota, being the statute particularly attacked as unconstitutional, gave sufficient notice and opportunity to be heard before an assessment became a lien against the property, and was constitutional. The court also held that the proceedings of the commissioners were proceedings for the maintenance of the original ditches No. 1 and No. 2; that there was no abandonment of the old ditches; that the formation of the new ditch was a pretense and subterfuge carried on for the purpose of compelling property outside of the original ditches No. 1 and No. 2 to share the burden of the repair and maintenance of these ditches, and held that the proceedings of the commissioners with relation to ditches No. 1 and No. 2, by attempting to constitute a new drainage district and calling it district No. 1 and 2, were void.

The court further found that the complaints presented a real and substantial question under the Constitution of the United States; that the amount involved was in excess of $3,000 exclusive of interest and costs, and that each complainant stated a case in his bill cognizable in equity in the federal court; and that there was no adequate remedy at law. Also found that diversity of citizenship existed as to all appellees, except as to the city of Sioux Falls; also, that the method of attempted assessment was discriminatory and arbitrary. The injunctions as prayed were granted.

N. B. Bartlett and E. O. Jones, both of Sioux Falls, S. D., for appellants.

A. B. Fairbank, of Sioux Falls, S. D. (Edward S. Stringer, Thomas D. O'Brien, and Alexander E. Horn, all of St. Paul, Minn., on the brief), for appellee Chicago, R. I. & P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D., and E. L. Grantham, of Aberdeen, S. D. (H. H. Field, of Chicago, Ill., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, M. & St. P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D. (R. L. Kennedy, of St. Paul, Minn., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, St. P., M. & O. Ry. Co.

Harold E. Judge, of Sioux Falls, S. D. (R. M. Campbell, of Chicago, Ill., on the brief), for appellee Northern States Power Co.

C. O. Bailey, of Sioux Falls, S. D. (Roy B. Marker, of Sioux Falls, S. D., on the brief), for appellee City of Sioux Falls.

Harold E. Judge, of Sioux Falls, S. D., for appellee Great Northern Ry. Co.

Before KENYON, Circuit Judge, and TRIEBER and DYER, District Judges.

KENYON, Circuit Judge (after stating the facts as above). It is earnestly contended by appellees that the entire South Dakota drainage law is unconstitutional, not only as violative of the due process clause of the Fourteenth Amendment of the Federal Constitution, but also sections 2 and 13 of article 6 of the South Dakota Constitution. The constitutional questions raised are grave, serious, and doubtful. Their determination is not necessary to the solution of these cases. Therefore, under the well-established rule that federal courts will not pass upon the constitutionality of statutes unless absolutely necessary, we leave the questions aside. Howat et al. v. State of Kansas, 258 U. S. 181, 42 Sup. Ct. 277, 66 L. Ed. 550; Weyman-Bruton Co. v. Ladd, 231 Fed. 898, 146 C. C. A. 94; Allen, U. S. Atty., v. Omaha Live Stock Commission Co. et al. (C. C. A.) 275 Fed. 1.

The original drainage ditches No. 1 and No. 2 were properly established for the drainage of agricultural lands. When the spillway washed out, the maintenance of the ditches was impaired. Not only that, but the situation was fraught with grave

consequence to many interests. The steep bluff was being torn away by the uncontrolled waters; the waterworks and water supply of the city of Sioux Falls, as well as the penitentiary lands of the state, were endangered. A not improbable result of the Big Sioux river breaking through the natural barrier into the lateral ditch would be the entire diversion of its waters from their natural channel causing them to flow through said ditches and empty into the river north of the city, leaving Sioux Falls with an intermittent dry river bed.

The board of county commissioners under these conditions took steps to remedy the situation, and upon petition filed stating its object in its caption as follows: "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefited Thereby," proceeded to establish what is termed drainage ditch No. 1 and 2, Minnehaha county, S. D.

Appellees who have property within the area of the original drainage ditches, No. 1 and No. 2, insist that the proceedings established a new drainage ditch known as No. 1 and 2, which is also the position taken by appellants. Other appellees claim that the work was in truth and in fact a project for the repair of drainage ditches No. 1 and No. 2. The court held that the forming of the new ditch was a pretense and subterfuge resorted to for the purpose of attempting to burden appellees with the cost of maintenance of ditches theretofore constructed; that the commissioners did not act as by law provided for the maintenance and repair of the ditches; and that the proceedings attempting to establish the new drainage ditch were void. We think the court was correct in this holding. It clearly expressed the situation as follows:

"Under these circumstances the board of county commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the state when they assumed the right to reach out and attempt to assess the benefits for the repair and maintenance of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage ditch No. 1 and 2 was ever established and has no existence.

"I am of opinion that the proceedings of the board of commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it district No. 1 and 2, and to assess benefits to the property of the plaintiffs, in so far as they are located in the city of Sioux Falls, are void. Entertaining this view, it follows that plaintiff's prayer for an injunction should be granted."

Record, p. 90, Case No. 6313.

The proceedings, regardless of how designated, were in fact for repair and maintenance, and were governed as to assessments to pay for the same by section 8470 of the South Dakota Statutes, which section is as follows:

"*Assessments for Maintenance.*—For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforceable, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners." Section 13, c. 98, 1905; section 13, c. 134, 1907.

There is no provision in this statute for the taking in of other lands to help bear the assessment of burdens created in maintaining the original drainage. This was the statute under which the board of county commissioners could have provided for payment of maintenance and repairs to the established ditches.

Section 8489 provides for a method of abandonment of drains under certain circumstances and the construction of new ones in the same location. Said statute is as follows:

"*Invalid or Abandoned Proceedings.*—If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned proceeding, the board of county commissioners shall proceed to ascertain the real value of the services rendered, money expended and work done under such invalid, abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may be at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part

of the cost of the new drainage. No use shall be made by any board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons." Section 33, c. 134, 1907.

The proceedings establishing drainage ditches No. 1 and No. 2 have never been set aside or abandoned under this statute. It is true a small portion of old ditch No. 1 was abandoned by the resolution adopted in the Covell's Lake proceeding, but the ditches were in no way abandoned. The Covell's Lake proceeding was itself abandoned and the ditches were left as they originally were, so it is apparent that the action of the board was not taken under section 8489. Either the proceedings were to repair and maintain ditches already constructed, or they were to take care of a situation resulting from their imperfect or inadequate construction. By reason of the water of the river breaking through into the lateral threatening a change of the river's course and the possible destruction of state lands, a situation was presented, not with relation to the drainage of agricultural lands, but rather to the failure of the ditches, due to inadequate or imperfect construction, to carry the increased flow of water. In other words, the project, if an entirely new one, was not for the drainage of agricultural lands. The court said in his opinion:

"Pursuant to this provision of the Constitution, the Legislature of the state has provided for the drainage of agricultural lands; but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands 'for any public use.'"

We are satisfied that under the South Dakota Constitution, section 6, art. 21, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes.

Appellants challenge the jurisdiction of the court, claiming there was a plain, adequate, and complete remedy at law; that there was no equity in the bill; that action was premature, and that the necessary jurisdictional amount was not involved. These in their order.

It is fundamental that equity cannot give relief where there is a plain, adequate, and complete remedy at law. It is provided by the federal Judicial Code, Compiled Stat. 1918, § 1244, as follows:

"*Suits in Equity.*—Suits in equity shall not be sustained in any court of the United States in any case where a plain, ade-

quate, and complete remedy may be had at law. (R. S. § 723. March 3, 1911, c. 231, § 267, 36 Stat. 1163.)"

It must be a remedy as certain, complete, prompt, and efficient to attain the ends of justice as that in equity. Monmouth Inv. Co. et al. v. Means, 151 Fed. 159, 80 C. C. A. 527; McMullen Lumber Co. v. Strother et al., 136 Fed. 295, 69 C. C. A. 433; Morgan v. Beloit, City and Town, 74 U. S. (7 Wall.) 613, 19 L. Ed. 203; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82; Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796; Greene, Auditor, et al., etc., v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Coler et al. v. Board of Com'rs of Stanly County et al. (C. C.) 89 Fed. 257.

It must be a remedy on the law side of the federal court. A remedy in the state court that cannot be pursued in the federal court is not an adequate remedy. Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; United States Life Ins. Co. in City of New York v. Cable, 98 Fed. 761, 39 C. C. A. 264; Brun et al. v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

The question is: Has party the adequate remedy at law in the federal court?

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391, 14 Sup. Ct. 1047, 1052 (38 L. Ed. 1014), the court said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

It has been held that where the state statute provided an action at law against the county for the recovery of sums paid on account of invalid taxes that the same constitutes a plain, speedy, and adequate remedy at law. Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., 217 Fed. 540, 133 C. C. A. 392. The Supreme Court of the United States has held that the North Dakota statute permitting actions respecting title of the property or accruing on contract to be brought against the state the same as against a private person does not clearly allow an adequate remedy; and there, injunction restraining defendants from taking steps to enjoin certain taxes, was upheld. Wallace et al. v. Hines, Director General of Railroads, et al., 253 U. S. 66, 40 Sup. Ct. 435, 64 L. Ed. 782. There was no such proceeding as discuss-

ed in Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., supra, in the South Dakota statutes. The only remedy was to appear before the board of county commissioners (claimed by appellees to be acting without authority), and then appeal from their finding to the state court. Such was not the adequate remedy contemplated by the federal statute.

While the frequent exercise of equity jurisdiction is in staying the collection of taxes illegal in whole or in part, a suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal. There must be special circumstances bringing the case under some recognized head of equity jurisdiction. The right to such equitable relief must be clear where it is asked to restrain the collection of a state tax.

In Hannewinkle v. Georgetown, 15 Wall. 547, 548 (21 L. Ed. 231), it is said:

"It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction."

In Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 525, 526, 5 Sup. Ct. 601, 605 (28 L. Ed. 1098), the rule is clearly laid down by the court:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any grounds for equitable interposition. In ordinary cases a party must find his remedy in the courts of law and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these in proper cases, may be afforded

in courts of equity.' This statement is in general accordance with the decisions of this court as well as of many state courts."

See, also, Dows v. City of Chicago, 78 U. S. (11 Wall.) 108, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; Pittsburgh, etc., Railway v. Board of Public Works of W. Va., 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the alleged invalidity consisted in discriminatory overvaluation. There was no claim of absolute illegality in the assessment. Appellant had a remedy with the board of review to correct the assessment, and the court said that resort to the suit to prevent either a sale for an illegal tax creating a cloud upon title or other irreparable injury had no basis.

In Union Pacific R. Co. v. Board of Com'rs of Weld County, 217 Fed. 540, 133 C. C. A. 392, this court said with reference to the casting of a cloud upon real property creating an "equitable circumstance" that the remedy which the statute prescribes will dissipate any such cloud, and says:

"Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable, when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted."

There is no such provision in the South Dakota statute.

In Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796, it was held that equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected in suit at law in which the defense of its illegality is open, and further it not appearing that the tax is a lien on any of complaint's property.

In Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651, certain assessments upon shares of stock in a corporation were involved. The court found that as there was no lien created on real estate there was no cloud on title.

It is well settled that an assessment that will put a cloud on titles gives rise to equitable jurisdiction unless there is an adequate remedy at law. Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; Green, Auditor, et al., etc., v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

Section 8463 of the South Dakota Statutes provides for the board of county commissioners fixing the proportion of benefits of proposed drainage among the lands affected.

Section 8464 provides for the board making an assessment against each tract and property affected, and this is collectible

by the treasurer's office. Clearly the assessment would create a cloud upon the title. Fixing the proportion of benefits being preliminary to the assessment and a part of the machinery of assessment, likewise, we think, creates a cloud upon the title and gives equity jurisdiction. Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Hopkins et al. v. Walker et al., 244 U. S. 486, 37 Sup. Ct. 711, 61 L. Ed. 1270.

Was the case prematurely brought? It is claimed that inasmuch as the board of county commissioners had not assessed the taxes complained of consequently the suit is premature.

In Western Union Telegraph Co. v. Howe et al., 180 Fed. 44, 103 C. C. A. 398, it was held by this court that the suit was prematurely brought because the telegraph company did not pursue the remedy afforded by law to have its assessment corrected by the state board of equalization. That was not a case, however, where it was claimed that the entire proceedings were without authority and illegal, as is the case here. The jurisdiction to act was not questioned.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the question involved was the amount of the tax. It was not claimed that the proceedings were illegal.

In the late case of Milheim et al. v. Moffat Tunnel Improvement District et al., 262 U. S. 710, 43 Sup. Ct. 694, 67 L. Ed. 1194, there was no question of jurisdiction of the taxing body as there is here. Plaintiff's property was by legislative act placed within the taxing district.

The proceeding here involved, being without authority, the situation is quite different from where the only question involved is the inequality of taxes levied by a board having jurisdiction to act. The actions, we are satisfied, were not premature.

Appellants urgently insist that it does not appear from the record that the amount in controversy, exclusive of interest or costs, exceeds the sum or value of $3,000, and that the statements in the various complaints of appellees so alleging are false, and stated with the fraudulent purpose of imposing upon the jurisdiction of the federal court; that no tax has in fact been assessed; that the apportionment of benefits is tentative and subject to correction; and that there is no way of determining what the amount of the assessment against the respective appellees would have been had the proceedings not been interrupted by the injunctions; and that there is in fact no sum whatsoever in controversy between the parties hereto.

It has been held that future, undetermined, unaccrued, or unspecified taxes cannot be taken into consideration to give jurisdiction; that the court cannot engage in speculation as to such taxes. Holt v. Indiana Manufacturing Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374; New England Mortgage Security Co. v. Gay, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646; Citizens' Bank

v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 ... Ed. 451; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951. Also, that where there is a suit to enjoin collection of a tax the amount of the tax is the test of jurisdiction. Linehan Ry. Transfer Co. v. Pendergrass, 70 Fed. 1, 16 C. C. A. 585; Eachus v. Hartwell et al. (C. C.) 112 Fed. 564; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951; Board of Trustees of Whitman College v. Berryman et al. (C. C.) 156 Fed. 112; Citizen's Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; City of Ottumwa, Iowa, v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

It has also been held that where the complaint alleges the amount in controversy to equal the jurisdictional requirement and the contrary does not appear to a certainty from the evidence, that the jurisdiction will be sustained. Maffet v. Quine (C. C.) 95 Fed. 199; Von Schroeder v. Brittan (C. C.) 93 Fed. 9.

What is the situation here? Each one of the appellees is threatened with an assessment of more than $3,000. The Northern States Power Company is threatened with one of $50,000. And further, certain appellees who have no property within the original drainage districts No. 1 and No. 2 are brought into the district and made liable to further assessments for maintenance and repair of ditches. It appears from the record that the board of county commissioners had fixed against the different appellees the proportion of benefits on a unit basis. It is without question that the county commissioners have issued approximately $255,000 worth of warrants for this work, and that the amount due thereon is about $300,000. It is a matter then of mere mathematical calculation to arrive at the threatened assessment against each one of appellees.

Exhibit C is the notice to the various parties against whom proportions of benefits have been fixed. It provides as follows, to wit:

"All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed as stated, and the said determination of said board made final."

If no action whatever were taken by appellees the amounts would be final, and under these circumstances we believe the amount in dispute in each case exceeds the jurisdictional requirement. The claim of amount is evidently made in good faith, and not for the mere purpose of giving the federal courts jurisdiction. We do not believe that where the board has passed a resolution fixing benefits which exceed the jurisdictional amount and are the basis of a proposed assessment, and which parties claim are fixed by the board without authority, that because said board may equalize the benefits or even find that no benefits exists the parties must wait until the final action of the board. It is suggested that the board may so equalize benefits that the jurisdictional amount will not be involved, but as the matter

stood when the case was brought each appellee was threatened with the levying of a tax for more than the jurisdictional amount, and some of the necessary steps had already been taken.

As the proportion of benefits had been fixed subject to change by the board only if appellees should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the federal court.

All bills of complaint raise questions under the federal Constitution that are substantial and not merely colorable. Hence the court has jurisdiction exclusive of diversity of citizenship, which existed as to all appellees except the city of Sioux Falls, necessary amount being involved, to determine all questions in the record, and it has not lost jurisdiction by omitting to decide the constitutional ones. Silver et al., etc., v. Louisville & Nashville R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Louis. & Nash. R. R. Co. v. Finn, 235 U. S. 601, 35 Sup. Ct. 146, 59 L. Ed. 379; Greene, Auditor, et al., etc., v. Louis. & Interurban R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

Appellants plead estoppel against all of the appellees, and claim that appellees are not in position to maintain their actions, for the reason that as to some of the railroad companies the engineering departments have been in close touch with the drainage ditch proceedings; that some of them were assessed for benefits received upon the construction of the original drainage ditches in the same territory, received benefit thereby, and have not protested before the bringing of this action. As to some of the appellees it is claimed that their officers showed interest in the construction work and encouraged the board of commissioners to do the work; that some of the appellees, for instance, the Chicago, Milwaukee & St. Paul Railway Company, hauled men and materials used in the construction work, and stopped trains between stations to unload men and materials. As to the city of Sioux Falls, it is claimed by way of estoppel that under due authority the mayor and city auditor signed the petition for the project. There can certainly be no just claim of estoppel as to those appellees whose property was not within the area of the original drainage ditches No. 1 and No. 2. As to the other appellees, the decree related only to the property outside of the original assessment areas of drainage ditches No. 1 and No. 2. So we are to consider the situation as bearing on the question of estoppel only as to the property outside of the original assessment areas up to the time of the notice of the fixing of benefits. The various appellees as to such property had no notice, when the acts constituting the alleged estoppel took place, that the same was to be affected by the drainage construction or would be assessed for the cost thereof. Hence the claimed acts of agents and officers of appellees would not constitute estoppel. The situation

is quite different from that presented in Gilseth v. Risty (S. D.) 193 N. W. 132—at least as to all appellees except the city of Sioux Falls. We do not pass on the question of estoppel as to any appellees, as to assessments that may be made on their property within the original area of ditch No. 1 and ditch No. 2, for the purpose of maintaining such ditches.

Other questions are presented which we think are not involved in the determination of these cases.

The decree of the trial court in each case is affirmed.

BRIEF AND ARGUMENT FOR APPELLEE

Supreme Court of the United States

October Term 1925

No. 99.

A. G. RISTY *et al*, as County Commissioners, etc., *et al.*,
Appellants,

vs

THE CITY OF SIOUX FALLS,
Appellee

APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

C. O. BAILEY,
J. H. VOORHEES,
T. M. BAILEY,
ROY D. BURNS,
Solicitors for Appellee.

(30,420)

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APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE

The City of Sioux Falls, Plaintiff and Appellee, filed its bill in the District Court of the District of South Dakota praying for an injunction. From a decree granting an injunction the Defendants and Appellants appealed to the Circuit Court of Appeals of the Eighth Circuit, in which latter court the decree of the District Court was affirmed. From the decision of the Circuit Court of Appeals the defendants appeal to this Court.

This suit involves the constitutionality of the Drainage Ditch Statute of the state of South Dakota under both the federal and state constitutions and also involves the regularity and validity of proceedings taken under that statute. The facts out of which this suit arises, are, as follows:

STATEMENT OF FACTS

At the election in November, 1906, there was adopted an amendment to the constitution of South Dakota which is known as Section 6 of Article XXI of that constitution and which is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there- "of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene- "fited thereby, according to benefits received."

The legislature of South Dakota has never enacted any law to carry into effect the powers, conferred upon it by the foregoing constitutional amendment providing for the organization of drainage districts, but has enacted, or attempted to enact various laws vesting the corporate authorities of the several counties of the state with power to construct levees, drains, and ditches and to keep the same in repair by special assessments upon the property benefited thereby.

The first drainage ditch enactment was Chapter 98 of the Session Laws of South Dakota, 1905, which was passed prior to the adoption of Section 6 of Article XXI of the South Dakota constitution. After the adoption of that section a new law was passed which is known as Chapter 134 of the Session Laws of South Dakota, 1907. The 1907 law was amended by Chapter 102 of the Session Laws of South Dakota, 1909. The 1907 law was further amended by Chapters 207 and 208 of the Session Laws of South Dakota, 1917. In 1919 the entire drainage law was recompiled and re-enacted as Sections 8458 to 8507, South Dakota Revised Code of 1919. Further amendments were enacted in 1919 which appear as Chapter 46 of the Session Laws of the First Special Session of the Sixteenth Legislature of South Dakota and by Chapters 193, 194, 195, 196, 197 and 198 of the Session Laws of South Dakota, 1921.

For the convenience of the court we are printing as Appendix A of this brief the portions of the South Dakota constitution, and as Appendix B the portions of the South Dakota laws which bear upon the questions at issue in this suit.

The Big Sioux river has its origin in a lake in the northeastern part of South Dakota and runs thence in a generally southerly direction, and in the eastern part of South Dakota, (of which state it is in places the boundary line) for about 100 miles and empties into the Missouri river at a point a short distance north of Sioux City, Iowa. In its course the Big Sioux river passes through the center of the city of Sioux Falls. It strikes Minnehaha county, in which Sioux Falls is situated, at its north line and flows in a generally southerly direction, but with many bends and curves, for a distance, in a straight line, of twenty-four miles, running in its course two and one-half miles west of the business center of the city of Sioux Falls and south to a point three miles south of the business center. It then flows in an easterly direction for about three miles and then turns north, running through the business center of the city of Sioux Falls and northerly to a point two miles from the business center. It then runs in an easterly direction for several miles when it again resumes its southerly course towards its junction with the Missouri river. The consequence is that at the city of Sioux Falls the river runs like an inverted letter "S," upon the bar of which Sioux Falls is situated.

From a point about five miles south of where the Big Sioux enters Minnehaha county it runs through a valley or flat from two to four miles in width until it reaches a point about three miles southwest of the business center of the city of Sioux Falls. From there on until it reaches the northeastern portion of the city the river is confined by high banks on either side and with no valley interposing between them.

There is comparatively little fall between the point where the Big Sioux river enters the flat about fifteen miles north of the city of Sioux Falls and the northeastern section of the city where the river passes over a series of falls of an aggregate height of more than one hundred feet. The result is that the level of the river bed, as it

passes over the falls in the northeastern portion of the city of Sioux Falls, is over one hundred feet below the level of the river at a point, four miles to the westward, where it passes to the west of the city of Sioux Falls.

About 1878, a dam was constructed for water power purposes across the Big Sioux river within the limits of the city of Sioux Falls a short distance above the falls and, between that dam and the falls, other dams were subsequently constructed, all of which were in existence long prior to any of the transactions out of which this suit arises. These dams for many years have been utilized, without complaint from any source, by the Northern States Power Company and its predecessors, as a source of water power, and upon the dams and power works several hundreds of thousands of dollars have been expended with the consent, express or implied, of the public authorities of Minnehaha county and of the city of Sioux Falls and of the property owners along the Big Sioux river.

The city of Sioux Falls, something over twenty years ago, located its municipal waterworks upon the flat north of the city, between the Big Sioux river where it flows in a southerly direction to the westward of the city and where it flows to the northward after it passes over the falls in the northeastern portion of the city. The flat where the waterworks are situated is a few feet higher than the level of the river bed to the westward of the waterworks plant and more than one hundred feet higher than the level of the river bed to the eastward. Between the two channels of the river (at this point about 3½ miles apart) there is an extensive gravel bed underlying the surface of the ground, which gravel bed is filled with water and is the source from which the city of Sioux Falls obtains its municipal water supply.

For many years, and from in fact shortly after the settlement of Minnehaha county in the late sixties and early seventies, complaints arose in regard to the flooding of the land in the valley of the Big Sioux river north of the city of Sioux Falls. The topography of the country along this valley being level and there being but little fall in the river bed for a distance of nearly thirty miles, between the north end of the flats and the falls of the Big

Sioux river, the surface waters, in times of freshets, would accumulate upon the flats and remain there for several days, and sometimes for weeks, before they gradually flowed off through the narrow river channel south of the city of Sioux Falls and through the city until they reached the falls. This situation was made still worse by the construction of the dam upon the river above the falls in 1878 which hindered still further the passage of the water along the river bed before it reached the falls. As the state of South Dakota became more and more densely settled in the counties along the Big Sioux river north of Minnehaha county, numerous drainage ditches were established, the effect of which was still further to accelerate the flow of surface water during freshets and to cause a still greater volume of water to accumulate upon the flats north of the city of Sioux Falls.

In December, 1907, the Board of County Commissioners of Minnehaha county, purporting to act under the authority of Chapter 134 Session Laws of South Dakota, 1907, established a drainage ditch known as Drainage Ditch No. 1. This ditch was some three miles in length and extended, from a point on the Big Sioux river below the falls, northward to a point on the flat north of the city of Sioux Falls. In 1910, the Board of County Commissioners, again purporting to be acting under the authority of Chapter 134 of the Session Laws of South Dakota, 1907, as amended by Chapter 102, Session Laws of South Dakota, 1909, established a second ditch, known as Drainage Ditch No. 2, which commenced at the north end of Drainage Ditch No. 1 and extended in a northerly direction for about twelve miles.

At the point Drainage Ditch No. 1 empties into the Big Sioux river below the falls it passed over a hill in a descent of about one hundred feet. The bottom of the ditch was covered along this descent with concrete, making a spillway through which the water accumulating upon the flats could run to reach the channel of the Big Sioux river below the falls.

Drainage Ditch No. 1 and Drainage Ditch No. 2 operated more or less successfully in draining the flats until the spring of 1916 at which time, during a somewhat heavy rainfall, the concrete bottom of Drainage Ditch No.

1, (or its spillway) washed out and the water began cutting a channel through the hill.

The fact that the concrete spillway had washed out did not in any manner decrease the efficiency of Drainage Ditch No. 1 and Drainage Ditch No. 2 as drainage propositions. In fact, the washout of the spillway made them still more efficient for draining purposes, and if they had been left alone they would very speedily have settled the question of drainage for the lands upon the flats. The effect of the washout was to open a passage for all of the water which accumulated upon the flats into the channel of the Big Sioux river below the falls and this channel was amply sufficient to have taken care of all of the water which ever accumulated upon the flats. In fact, it was a perfect success as a drainage proposition.

Unfortunately, while Drainage Ditch No. 1, after its spillway was washed out, succeeded in doing all in the way of drainage that the owners of the lands upon the flats desired to have done, it seriously affected other interests. If the water had been allowed to go without hindrance through the new channel it would, within a very short time, have diverted the entire course of the water in the Big Sioux river and would have formed a new channel for the river across the flats north of the city of Sioux Falls, in which channel all of the water coming down the river could have flowed into the channel below the falls without passing around and through the city of Sioux Falls and over the falls, thus cutting off about twelve miles of the river channel. The further effect would have been to destroy the waterpower formed by the dams across the Big Sioux river in the city of Sioux Falls above the falls, as the only water which would have flowed in the Big Sioux river channel through the city of Sioux Falls and over the falls would have been the water from Skunk creek, a tributary of the Big Sioux river, emptying into that stream south of the city of Sioux Falls. Another effect of allowing the river to run through its new channel would have been to destroy the municipal water plant of the city of Sioux Falls by draining the water from the gravel bed from which the city obtained its water supply.

After the spillway at the outlet of Drainage Ditch No. 1 had washed out in March, 1916, various plans were

proposed looking toward the control of the water which flowed through the ditch. Many conferences were had between the Board of County Commissioners and the representatives of the various interests affected. The Appellee was not represented at any of these conferences and never took any part in any manner in them or in the subsequent proceedings.

In October, 1916, the Board of County Commissioners took proceedings by which they attempted to establish a new ditch project which they named "Drainage Ditch No. 1 and 2." Thereafter, all proceedings with respect to Drainage Ditch No. 1 and with respect to Drainage Ditch No. 2 were abandoned and all subsequent work was done by the Board of County Commissioners upon the new project, "Drainage Ditch No. 1 and 2."

The Board of County Commissioners, after attempting to organize Drainage Ditch No. 1 and 2, proceeded to construct additional ditches, cut-offs, and dams in the flats above the city of Sioux Falls, and at the former outlet of Drainage Ditch No. 1, to construct a spillway, and other water retaining works for the purpose of controlling the flow of the water through the ditches. This work was done by the Board of County Commissioners without any regard to the requirements of the South Dakota drainage statutes and without having first had plans therefore prepared and approved by the state engineer. The most of the work was done by the board without letting a contract therefor and upon the cost-plus plan. The result was, that at the end of the construction period, the cost of the work done by the Board of County Commissioners upon Drainage Ditch No. 1 and 2 had amounted to a sum in excess of $250,000, of which upwards of $150,000 was expended upon the spillway and other water retaining works at the outlet of the ditch. For the amount expended, the Board of County Commissioners issued warrants upon the Drainage Ditch No. 1 and 2. These warrants were taken by the laborers and material men employed upon the construction work and were in most instances discounted to the local banks in Minnehaha county.

After a number of abortive attempts to levy an assessment for the purpose of raising the money to pay the warrants issued for the work done upon Drainage Ditch No.

1 and 2, the Board of County Commissioners, in June, 1921, adopted a notice of time and place for equalizing the proportion of benefits for the construction of the work on Drainage Ditch No. 1 and 2, in which notice the proportion of benefits assessed against Appellee was 3145.95 units out of a proposed total of 32549.62 units, upon the basis of which proportion the assessment against Appellee and its property would be in excess of $29,900.

The plaintiff and Appellee brought this suit to enjoin the making of any assessment upon its property for the work done upon Drainage Ditch No. 1 and 2. A temporary injunction was granted *pendente lite*. The defendants named in the bill were the Board of County Commissioners of Minnehaha County, the Auditor, and the Treasurer of that county. Subsequently, the various banks and other persons holding drainage ditch warrants filed a petition for leave to intervene in the suit. This petition was granted and answers were filed both by the defendants and by the intervenors. Upon the hearing of the suit upon its merits, a final decree was entered enjoining the Board of County Commissioners from making any assessment for the expense of the work done under the proceedings establishing Drainage Ditch No. 1 and 2. (Record pp. 86-88.) *Chicago, Rock Island & Pacific Railway Company vs Risty*, 282 Fed. 364.)

In its bill Appellee set up the facts concerning the construction of Drainage Ditches No. 1 and No. 2 and the subsequent construction of a spillway and attacked the constitutionality of the South Dakota Drainage Statute in the following allegations:

"That said purported statute of the state of South "Dakota 'Exhibit A' hereto, is unconstitutional and void, "in that the same is in violation of Section 2 of Article "VI, of the Constitution of the State of South Dakota, "and in that the same is in violation of the Fourteenth "Amendment of the Constitution of the United States; "that said Statute, 'Exhibit A', is further void and un- "constitutional in that the same provides no fixed and "determinable method or rule for the apportionment of "benefits upon the property and property owners situat- "ed within the drainage area, and especially in that said

"purported statute furnishes no fixed or determinable "basis for the apportionment of benefits upon the prop- "erty of railroad companies and other corporations, and "upon the property of municipal and quasi-municipal cor- "porations, and upon platted property in cities and vil- "lages. Said purported law, 'Exhibit A', is further un- "constitutional and void in that the same provides for an "assessment against property without the right of the "property owner to be heard thereon and without notice "of any character to the property owner; that if said ap- "portionment of benefits be made as threatened by the "said Board of County Commissioners of said Minnehaha "County, and as is provided in said notice, 'Exhibit C', "the same will constitute the taking of the property of "plaintiff and of the other property owner affected by "said notice without due process of law; that a cloud will "be placed upon the title of the plaintiff to its real prop- "erty situated within said drainage area affected by "said notice, 'Exhibit C' and that there will result a mul- "tiplicity of suits and that plaintiff and other property "owners affected will suffer irreparable injury." (Rec- ord, p. 13).

The bill also attacked the acts of the Board of County Commissioners of Minnehaha County in its proceedings relative to the construction of the spillway and other drainage works as being without jurisdiction on account of the unconstitutionality of the South Dakota Drainage Statute and also on account of such proceedings not being had in accordance with the provisions of the Statute. (Record, pp. 14-15). The apportionment of benefits made against the property of Appellee was further attacked as exorbitant, disproportionate to the assessment of other property and made upon an arbitrary and discriminatory basis. (Record, pp. 72-73).

In their answer, Appellants took issue upon the unconstitutionality of the South Dakota Drainage law and specifically set up the establishment by the Board of County Commissioners of a new ditch project under the title of "Drainage Ditch No. 1 and 2."

Upon the trial in the district court the issues involved were, under the pleadings:

1. The constitutionality of the South Dakota Drainage Ditch Statute.

2. The regularity of the proceedings of the Board of County Commissioners of Minnehaha county under the Statute.

3. The proper construction to be given to the provisions of the South Dakota Drainage Statute.

There was practically no dispute as to the facts out of which this suit arises. It was admitted by all parties to the controversy that originally the Board of County Commissioners of Minnehaha county had established two drainage ditches known respectively as Drainage Ditch No. 1 and Drainage Ditch No. 2. It was also conceded that after the spillway, at the outlet of Drainage Ditch No. 1, had been washed out, the Board of County Commissioners established a new ditch project known as Drainage Ditch No. 1 and 2.

This suit was one of six cases involving this same ditch project, but the positions taken by the plaintiffs in the various cases differed upon the proposition as to whether Drainage Ditch No. 1 and 2 was a new and independent proposition or whether it was merely a project for the maintenance and repair of Drainage Ditch No. 1 and Drainage Ditch No. 2 and consequently a continuation of those two propositions. In all of the six cases the contention of counsel for Appellants was that Drainage Ditch No. 1 and 2 was a new and independent proposition. This position was contested by plaintiffs in some of the cases who took the position that it was merely a maintenance and repair project. In the case at bar, the plaintiff (Appellee in this court) was content to coincide with the position taken by the defendants (Appellants in this court) and to base its right to an injunction upon a state of facts in which it conceded that Drainage Ditch No. 1 and 2 was a new and independent ditch proposition and not a continuation of the old Drainage Ditch No. 1 and Drainage Ditch No. 2.

In the District Court injunctions were granted to the plaintiffs in all the six cases, but in his opinion filed in the District Court, the District Judge took the position that Drainage Ditch No. 1 and 2 was merely a maintenance and repair project and a continuation of Drainage Ditch No.

1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company vs Risty,* 282 Fed. 364).

While we contend in this court, as we did in the Circuit Court of Appeals, that the decree of the District Court was properly entered and should be affirmed, we do not act as the defenders of the decree upon the grounds upon which it was based by the District Judge. The decree was, in our view of the controversy, properly entered, but the same decree should have been entered had the court been of the opinion that Drainage Ditch No. 1 and 2 was an independent and original ditch proposition and not a continuation and repair project of Drainage Ditch No. 1 and Drainage Ditch No. 2. In this position we do not coincide with the views expressed by counsel for the Appellees in other of the six cases now before this court. We accept the position of counsel for the Appellants that Drainage Ditch No. 1 and 2 was an original and independent ditch proposition and upon that basis shall proceed with our argument in support of the decree of the District Court and the decision of the Circuit Court of Appeals.

An appeal was taken by the defendants and by the intervenors to the Circuit Court of Appeals for the Eighth Circuit, in which court the decree of the District Court was affirmed. *Risty vs Chicago, Rock Island & Pacific Railway Company,* 297 Fed 710. The defendants and intervenors then filed a petition in this Court for a writ of certiorari and, at the same time, took this appeal. The application for a certiorari was denied. *Risty vs City of Sioux Falls,* 266 U. S. 622. The case is now before this court upon the appeal.

The foregoing being the facts in this suit, we submit on behalf of the Appellee, the City of Sioux Falls, the following:

BRIEF AND ARGUMENT

I.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND IS THEREFORE UNCONSTITUTIONAL.

The first proposition which we desire to present for the consideration of the Court is that the entire South Dakota drainage law is unconstitutional, our contention being that it is in violation of the "due process of law" clause of the fourteenth amendment to the federal constitution. The consideration of this question involves an analysis of the provisions of the South Dakota drainage statute as it existed at the time the Board of County Commissioners of Minnehaha county attempted to establish Drainage Ditch No. 1 and 2 and did the work thereunder.

The first statutory step in the establishment of a drainage ditch is the filing of a petition. (§2, ch. 134, Laws of 1907; §8459, R. S. 1919). This petition must "set forth "the necessity for the drainage, a description of the pro- "posed route by its initial and terminal points and its "general course, or by its exact course in whole or in part, "and a *general statement of the territory likely to be "affected thereby"*. It will be noticed that in the petition, which is the initial and jurisdictional step in the for mation of a drainage ditch, it is not necessary to include a description of the property which will be affected and upon which assessments will be levied to pay the costs of the construction of the ditch. All that is required is a "general statement of the territory likely to be affected "thereby." The next step in the proceeding is for the County Auditor to transmit a copy of the petition to the State Engineer, who, together with the Board of County Commissioners is required to inspect the proposed route and "if in the opinion of the Board and the State Engi- "neer it is necessary," the Board of County Commissioners causes a survey of the proposed drainage to be made by a competent engineer, selected by the Board, but under the general supervision of the State Engineer. This survey is primarily for the purpose of aiding the Board in determining the necessity for the proposed drainage but

it may be a complete survey such as will be required for the construction of the drainage and the assessment of its cost. All this is within the jurisdiction of the Board of County Commissioners. The survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. (§ 3, ch. 134, Laws of 1907; § 1, ch. 102, Laws of 1909; §8460, R. S., 1919). While the survey may, at the option of the Board of County Commissioners, be a complete survey for the purpose of ascertaining all facts required for the construction of the proposed drainage and the assessment of its cost, such complete survey is not rendered obligatory by the statute and the Board of County Commissioners may have made only so much of the survey as may be necessary to determine the necessity for the proposed drainage.

After receiving the report of the surveyor, the Board of County Commissioners is required to determine the "exact line and width of the ditch, if the same shall not "be fixed in the petition, and shall file its determination "with the petition." The Board then fixes the time and place for the hearing of the petition and gives notice by publication in a newspaper for two weeks and by posting copies of the notice in three public places near the route of the proposed drainage. The notice "shall describe the "route of the proposed drainage and the tract of country "likely to be affected thereby in general terms, the sep- "arate tracts of land through which the proposed drain- "age will pass and give the names of the owners thereof "as appears from the records of the office of the Register "of Deeds on the date of the filing of the petition, and "shall refer to the files in the proceeding for further par- "ticulars." The notice shall also "summon *all persons* "*affected* by the proposed drainage to appear at such "hearing and show cause why the proposed drainage shall "not be established and constructed." (§ 4, ch. 134, Laws of 1907; § 2, ch. 102, Laws of 1909; § 8461, R. S. 1919). This notice is the only notice given to property owners prior to the establishment of a drainage ditch and is the only notice under which the Board can acquire jurisdic-

tion to make an assessment. The owners are named of the separate tracts of land through which the proposed drainage will pass but no description is given of the property *affected by the proposed drainage ditch or which will be assessed for the cost of the construction thereof.* The notice merely describes the route of the proposed drainage and the "tract of country likely to be affected thereby *"in general terms"* and then summons *"all persons af-"fected by the proposed drainage"* to appear at the hearing. A notice designating as the tract of country "likely "to be affected thereby in general terms" would be sufficient, if it named as such "tract of country" the entire county in which the drainage ditch is to be constructed. Nothing whatever is required in the notice by which any property owner, other than one owning land through which the ditch is to be constructed, is appr ised that he is affected or that his land will be assessed for the construction of the proposed drainage ditch. In fact, all that the South Dakota law requires is for the Board of County Commissioners of a South Dakota county to publish and post a general notice summoning "all persons affected" to appear at the hearing, in order to support an assessment, for the construction of the ditch, upon all of the real property situated within the county limits. There is absolutely nothing in the statutory notice to inform any property owner that he will be called upon to pay an assessment. After the ditch is constructed, the Board of County Commissioners is at liberty, under the South Dakota statute, to extend the assessment to all property in every direction up to the county boundary lines. If this be sufficient notice, then after it is given, the Board of County Commissioners has the power to assess for the cost of the construction of any ditch every acre of property within the county limits.

At the hearing upon the petition, the South Dakota statute kindly permits "any person interested" to appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the Board as to the width and route of the proposed ditch. After the hearing, the County Board may establish the drainage ditch. (§ 5, ch. 134, Laws of 1907; § 3, ch. 102, Laws of 1909; § 8462, R. S. 1919).

After the establishment of the drainage ditch, the Board of County Commissioners "shall fix the proportion of benefits of the proposed drainage among the lands affected and shall appoint a time and place for equalizing the same." (§6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). There is no statutory requirement as to how soon after the establishment of the drainage ditch this shall be done and it is not necessary that it be done before the drainage project has been completed. It must be done before an assessment is made for the purpose of paying the cost of the establishment of the drainage project but the assessment, when made, includes all costs already incurred, or thereafter to be incurred. (§ 7, ch. 134, Laws of 1907; § 5, ch. 102, Laws of 1909; ch. 130, Laws of 1911; § 8464, R. S. 1919.)

The notice of equalization of proportion of benefits is given by publication once in each week for two consecutive weeks in a newspaper of the county and by posting copies of the notice in three public places near the route of the proposed drainage. The law requires that the "notice "shall state the route and the width of the drainage estab- "lished, a description of each tract of land affected by "the proposed drainage and the names of the owners of "the several tracts of land as appears from the records "of the office of the Register of Deeds, at the date of filing "of the petition, and the proportion of benefits fixed by "each tract of property, taking any particular tract as a "unit, and shall notify all such owners to show cause why "the proportion of benefits shall not be fixed as stated." (§ 6, ch. 134, Laws of 1907; § 4, ch. 102, Laws of 1909; § 8463, R. S. 1919). Here for the first time there is published a description of each tract of land "affected" by the proposed drainage and the names of the owners of such tracts. As in the case at bar, the work may have been completed and an expense of over a quarter of a million dollars incurred before the Board of County Commissioners determines what particular lands are "affected" by the proposed drainage and gives notice to the owners of such lands. A property owner for the first time notified that his land is "affected" by the proposed drainage has no right to object in any manner to the establishment of the drainage project. He has nothing to say in re-

gard to its manner or cost of construction; he has no voice in the selection of the particular tract of land taken as a unit; and all concerning which he can be heard is as to whether the proportion of benefits "shall not be fixed "as stated."

It is now too late for the property owner to escape. He is like a rat in a trap. All that he can do is to appear before the Board of County Commissioners and object to the proportion of benefits which has been assessed against him and ask to have that proportion reduced by raising the proportion of some other property owner. He is precluded from raising any question whatsoever as to the right to include his property within the drainage area. He has nothing to say as to the necessity for the drainage project or as to its manner of construction or its cost. Without any notice, either personal or constructive, his property has been included in the drainage area under the general proclamation of the Board of County Commissioners and he has no redress.

Theirs not to make reply,
Theirs not to reason why,
Theirs but to do and die,

even though

Someone had blundered.

The property owner cannot question the validity of the proceedings. All that is left for him to do is to pay.

Our contention is that the South Dakota drainage statute is in violation of the due process of law clause of the fourteenth amendment to the federal constitution for the reason that no opportunity is given a property owner, whose property is "affected" by the proposed drainage project, to appear prior to the doing of the work and the making of the assessment for the construction cost.

In support of the constitutionality of the South Dakota drainage statute, counsel for appellants have cited *Spencer vs. Merchant*, 125 U. S. 345. That case was decided by a divided court. The legislature of the state of New York had, by express enactment, determined that certain lands should be included within an assessment district in which the cost of the improvement was to be proportioned. The majority of the court held "that the deter-"mination of the territorial district which should be taxed

"for local improvement is within the province of legisla-
"tive discretion." The courts in this and a line of suc-
ceeding cases have made a clear distinction between cases in which a taxing district has been established by an act of the legislature and cases in which special assessments are to be made by some taxing body upon the property "beneficially affected" but not included within any taxing district established by legislative enactment. In the cases of taxing districts established by act of the legislature no notice need be given to the property owners of the inclusion of their property within the district, but a different rule applies in cases in which the taxing district is determined by the area of the land "beneficially affected."

Fallbrook Irrigation District vs Bradley, 164 U. S. 112, also cited by counsel in support of the constitutionality of the South Dakota drainage law, is, when carefully read, a strong authority against the constitutionality of the South Dakota statute. In the very elaborate opinion in this case the Court (p. 167) says:

"The legislature not having itself described the dis-
"trict, has not decided that any particular land would or
"could possibly be benefited as described, and, therefore,
"it would be necessary to give a hearing at some time to
"those interested upon the question of fact whether or
"not the land of any owner which was intended to be in-
"cluded would be benefited by the irrigation proposed. If
"such a hearing were provided for by the act, the de-
"cision of the tribunal thereby created would be sufficient.
"Whether it is provided for will be discussed when we
"come to the question of the proper construction of the
"act itself."

Later on in the opinion the court discusses the question whether the statute does provide for a hearing prior to the formation of the district and holds that under the provision of the statute under consideration and under the construction given it by the supreme court of California, by which state it was enacted, the right of hearing is given the property owner prior to the formation of the district. The court discusses the statute (pp. 170-172):

"We come now to the question of the true construc-
"tion of the act. Does it provide for a hearing as to
"whether the petitioners are of the class mentioned and

"described in the act and as to their compliance with the "conditions of the act in regard to the proceedings prior "to the presentation of the petition for the formation of "the district? Is there any opportunity provided for a "hearing upon notice to the land owners interested in the "question whetheir their lands will be benefited by the "proposed irrigation? We think the right to a hearing "in regard to all these facts is given by the act and that it "has been practically so construed by the Supreme Court "of California in some of the cases, above cited from the "reports of that court and in the case cited in the briefs "of counsel. We should come to the same conclusion from "a perusal of the act. The first two sections provide for "the petition and a hearing. The petition is to be signed "by a majority of the holders of title to lands susceptible "of one mode of irrigation, etc. This petition is to be pre-"sented to the board of supervisors at a regular meeting, "and notice of intended presentation must be published "two weeks before the time at which it is to be presented. "The board shall hear the same, shall establish and de-"fine the boundaries, although it cannot modify those de-"scribed in the petition, so as to except from the district "lands susceptible of irrigation by the same system of "works applicable to the other lands in the proposed dis-"trict, and the board cannot include in the district, even "though included in the description in the petition, lands "which shall not, in the judgment of the board, be bene-"fited by irrigation by said system.

"If the board is to hear the petition upon notice, and "is not to include land which will not, in its judgment, be "benefited by irrigation by the system, we think it fol-"lows as a necessary and a fair implication that the per-"sons interested in or who may be affected by the pro-"posed improvement have the right under the notice to "appear before the board and contest the facts upon which "the petition is based, and also the fact of benefit to any "particular land included in the description of that pro-"posed district.

"It is not an accurate construction of the statute to "say that no opportunity is afforded the landowner to test "the sufficiency of the petition in regard to the signers "thereof and in regard to the other conditions named in

"the act; nor is it correct to say that the power of the "board of supervisors is, in terms, limited to making such "changes in the boundaries proposed by the petitioners "as it may deem proper, subject to the conditions named "in the act.

"When the act speaks of a hearing of the petition, "what is meant by it? Certainly it must extend to a "hearing of the facts stated in the petition, and whether "those who sign it are sufficient in number and are among "the class of persons mentioned in the act as alone having "the right to sign the same. The obvious purpose of the "publication of the notice of the intended presentation of "the petition is to give those who are in any way interest-"ed in the proceeding an opportunity to appear before "the board and be heard upon all the questions of fact, "including the question of benefits to lands described in "the petition. As there is to be a hearing before the "board, and the board is not to include any lands which "in its judgment will not be benefited, the plain construc-"tion of the act is that the hearing before the board in-"cludes the question as to the benefits of the lands, be-"cause that is one of the conditions upon which the final "determination of the board is based, and the act cannot "in reason be so construed as to provide that while the "board is to give a hearing on the petition it must never-"theless decide in favor of the petitioners, and must estab-"lish and define the boundaries of the district, although "the signers may not be fifty, or a majority of the hold-"ers of title, as provided by the act, and notwithstanding "some other defect may become apparent upon the hear-"ing."

It will be seen in *Fallbrook Irrigation District vs Bradley* that the California statute differs from the South Dakota statute in that the petition must "particularly de-"scribe the proposed boundaries of such districts" and the petition itself must be published. After the petition is published and has been passed upon by the Board of Supervisors the question of the formation of the irriga-tion district is submitted to an election of the electors of the district who are also freeholders. (*Fallbrook Irriga-tion District vs Bradley*, 164 U. S. 112, pp. 116-117). These facts differentiate the statute passed upon in *Fall-*

brook Irrigation District vs Bradley from the South Dakota statute under consideration. Under the California statute the boundaries of the proposed district are fixed in the first instance and after they have been determined then the question of the formation of the district is put to a vote of the freeholder electors. We submit therefore, that the decision in *Fallbrook Irrigation District vs Bradley* is a distinct authority in favor of our position that the South Dakota drainage statute is unconstitutional. The court expressly determines in that case that notice must be given to the property owner of the formation of the district before his property can be included in it, and one of the requisites of notice is that the property owner be advised in some manner, either actually or constructively, that his land will be included within the limits of the proposed project.

Embree vs Kansas City Road District, 240 U. S. 242, is another case relied upon by counsel in support of the constitutionality of the South Dakota law. Here, again, is a case which we submit directly sustains our contention as to the invalidity of the South Dakota statute. The Court in the opinion (pp. 246-248) says:

"The district was not established or defined by the "legislature, but by an order of the county court made "under a general law. Whether there was need for the "district and, if so, what lands should be included and "what excluded was committed to the judgment and dis-"cretion of that court subject to these qualifications: "First, that the district should contain at least 640 acres "of contiguous land and be wholly within the county; sec-"ond, that the court's action should be invoked by a peti-"tion signed by the owners of a majority of the acres in "the proposed district, and, third, that public notice—con-"ceded to be adequate—should be given, by the clerk of "the court, of the presentation of the petition and the "date when it would be considered, and that owners of "land within the proposed district should be accorded an "opportunity to appear, either collectively or separately, "and oppose its formation. In this connection the statute "says: 'The court shall hear such petition and remon-" 'strance, and shall make such change in the boundaries " 'of such proposed district as the public good may re-

"'quire and make necessary, and if after such changes "'are made it shall appear to the court that such petition "'is signed or in writing consented to by the owners of "'a majority of all the acres of land within the district "'as so changed, the court shall make a preliminary order "'establishing such public road district, and such order "'shall set out the boundaries of such district as estab-"'lished . . . but the boundaries of no district shall be "'so changed as to embrace any land not included in the "'notice made by the clerk unless the owner thereof shall "'in writing consent thereto, or shall appear at the hear-"'ing and is notified in open court of such fact and given "'an opportunity to file or join in a remonstrance.' The "order actually made shows that four of the present plain-"tiffs, with three others, appeared in opposition to the "petition, recites that 'the court, after hearing and con-"'sidering said petition and said protests and remon "'strances and all evidence offered in support thereof, "'finds that the public good requires and makes necessary "'the organization, formation and creation of such pro-"'posed public road district . . . with boundaries as stated "'in said petition,' and sets out the boundaries of the "district as established.

"The sole purpose in creating the district, as the "statute shows, was to accomplish the improvement of "public roads therein—the particular roads to be desig-"nated by the district commissioners and an approving "vote of the land owners.

"As the district was not established by the legisla-"ture but by an exercise of delegated authority, there was "no legislative decision that its location, boundaries and "needs were such that the lands therein would be benefit-"ed by its creation and what it was intended to accom-"plish, and, this being so, it was essential to due process "of law that the land owners be accorded an opportunity "to be heard upon the question whether their lands would "be thus benefited. If the statute provided for such a "hearing, the decision of the designated tribunal would be "sufficient, unless made fraudulently or in bad faith. "*Fallbrook Irrigation District vs Bradley*, 164 U. S. 112, "174-175.

"Did the statute contemplate such a hearing? We

"have seen that it required that adequate public notice "be given of the presentation of the petition for the crea- "tion of the district and the time when it would be con- "sidered, made provision for the presentation of remon- "strances by owners of lands within the proposed district, "and directed that the petition and remonstrances be "heard by the county court, that the court make such "change in the boundaries 'as the public good may re- "'quire' and that the boundaries be not enlarged unless "the owners of the lands not before included consent in "writing or appear at the hearing and be given an oppor- "tunity to present objections. That a hearing of some "kind was contemplated is obvious, and conceded."

The case of *Soliah vs Heskin*, 222 U. S. 522, is strongly relied upon by counsel. That is a case arising under the North Dakota drainage law. The opinion at first glance would seem to support the contention of counsel for Appellants but an examination of the North Dakota statute, upon which the case arose, discloses the fact that the North Dakota law was not subject to the same objections which are urged against the South Dakota enactment. Under the North Dakota statute, a petition for the construction of the drain is filed with the board of drain commissioners. This petition designates the starting point and terminus and general course of the proposed drain. The board of drain commissioners then employs surveyors who prepare profiles, plans, and specifications of the proposed drain, an estimate of the cost thereof, and a map or plat of the lands to be drained in duplicate, showing the regular subdivisions thereof, one copy of which is filed in the office of the county auditor in the county in which the drain is proposed to be constructed and the other with the board of drain commissioners, subject to inspection. Upon the filing of the surveyor's report, the board of drain commissioners fixes a date and public place for hearing objections to the petitions and gives notice of such hearing. The notices must contain a copy of the petition and a statement of the date of filing of the surveyor's report and the date when the board will act upon the petition, must be signed by a majority of the members of the drainage board and "shall be sent by "registered mail to the last known address of each and

"every *owner of land which may be affected* by the pro-"posed drain." The North Dakota statute therefore requires that the names of "each and every owner of land "which may be affected" be determined and actual notice given these at the very inception of the project and this notice must be given by sending to each owner a copy of the petition and of a statement of the date of filing the surveyor's report and the date upon which the board will act upon the petition. That is a very different proposition from merely publishing notice "to all persons whose "property is affected" without first determining who are affected, as required by the South Dakota statute. The opinion in the case of *Soliah vs Heskin* must consequently be read in the light of the North Dakota statute which provides for the giving of notice at two stages of the proceedings to the property owner, first, a notice before the drainage district is formed, and, second, a notice when the assessment of benefits is made. The North Dakota statute provides exactly the thing for the want of which the South Dakota statute is unconstitutional.

Counsel for Appellants place great reliance upon the recent case of *Milheim vs Moffat Tunnel District*, 262 U. S. 710. That case is clearly to be distinguished from the case at bar. It is a case arising upon an assessment made in a taxing district, the limits of which had been fixed by act of the legislature of the state of Colorado. The supreme court held, following *Spencer vs Merchant*, 125 U. S. 345, and other similar cases, that the legislative authority of a state extends to the formation of taxing districts and that a state legislature can enact a law fixing the boundaries of a taxing district without giving notice to the owners of property included therein. That is an entirely different proposition from the one arising under the South Dakota drainage law and the decision of the supreme court in *Milheim vs. Moffat Tunnel District* is not an authority in support of the South Dakota statute which on its face does not attempt to form a taxing district by legislative enactment.

The case of *Voight vs Detroit City*, 184 U. S. 115, was cited by JUDGE ELLIOTT in his opinion deciding this case in the District Court. This case is one of a line of cases involving the making of special assessments in cities

for various municipal purposes. See also *St. Louis Land Company vs Kansas City,* 241 U. S. 419. In this line of cases the courts hold that cities organized under general laws or special acts of the legislature may impose special assessments under general statutes authorizing the levying of assessments in proportion to benefits. In all such cases, it is held by the courts, some opportunity must be given the taxpayer to be heard as to the proportion of the benefits to be assessed against his property but the property owner is not entitled to a hearing upon the question of the determination whether the improvements shall be made for which the special assessment is levied.

In the case of *Central of Georgia Railway Company vs Wright,* 207 U. S. 127, the Supreme Court held (quoting from the syllabus): "Due process of law requires "that opportunity to be heard as to the validity of the tax "and the amount of the assessment be given to a taxpay-"er, who, without fraudulent intent and in the honest be-"lief that it is not taxable, withholds property from tax "returns, and this requirement is not satisfied where the "taxpayer is allowed to attack the assessment only for "fraud and corruption."

In *Londoner vs Denver,* 210 U. S. 373, the Court, passing upon a Colorado statute, says:

"In the assessment, apportionment and collection of "taxes upon property within their jurisdiction the Con-"stitution of the United States imposes few restrictions "upon the States. In the enforcement of such restric-"tion as the Constitution does impose this court has re-"garded substance and not form. But where the legis-"lature of a State, instead of fixing the tax itself, com-"mits to some subordinate body the duty of determin-"ing whether, in what amount, and upon whom it shall "be levied, and of making its assessment and apportion-"ment, due process of law requires that at some stage "of the proceedings before the tax becomes irrevocably "fixed, the taxpayer shall have an opportunity to be "heard, of which he must have notice, either personal, by "publication, or by a law fixing the time and place of the "hearing. *Hager vs Reclamation District,* 111 U. S. 701; "*Kentucky Railroad Tax Cases,* 115 U. S. 321; *Winona &* "*St. Peter Land Co. vs Minnesota,* 159 U. S. 526, 537;

"*Lent vs Tillson,* 140 U. S. 316; *Glidden vs Harrington,* "189 U. S. 255; *Hibben vs Smith,* 191 U. S. 310; *Security* "*Trust Co. vs. Lexington,* 203 U. S. 323; *Central of* "*Georgia vs Wright,* 207 U. S. 127. It must be remem- "bered that the law of Colorado denies the landowner "the right to object in the courts to the assessment, upon "the ground that the objections are cognizable only by "the boards of equalization.

"If it is enough that, under such circumstances, an op- "portunity is given to submit in writing all objections to "and complaints of the tax to the board, then there was a "hearing afforded in the case at bar. But we think that "something more than that, even in proceedings for tax- "ation, is required by due process of law. Many require- "ments essential in strictly judicial proceedings may be "dispensed with in proceedings of this nature. But even "here a hearing in its very essence demands that he who "is entitled to it shall have the right to support his alle- "gations by argument however brief, and, if need be, by "proof, however informal. *Pittsburg &c Railway Co. vs* "*Backus,* 154 U. S. 421, 426; *Fallbrook Irrigation District* "*vs Bradley,* 164 U. S. 112, 171, *et seq.* It is apparent "that such a hearing was denied to the plaintiffs in error. "The denial was by the city council, which, while acting "as a board of equalization, represents the state. *Ray-* "*mond vs Chicago Traction Co.,* 207 U. S. 20. The as- "sessment was therefore void, and the plaintiffs in error "were entitled to a decree discharging their lands from "a lien on account of it."

In *Turner vs Wade,* 254 U. S. 64, the Court held (quoting from the syllabus) as follows:

"The Georgia Tax Equalization Act (Laws, 1913, p. "123 §§ 6-7), empowers the Board of County Tax Assess- "ors to assess property for taxation and requires it to "notify the taxpayer of changes made in his returns; it "gives him, if dissatisfied, the right to demand an arbitra- "tion, and provides that a majority of three arbitrators, "one appointed by him, one by the Board and the third by "the two so selected, shall fix the assessment; but the "arbitrators must render their decision within ten days "from the naming of the arbitrator by the board, other- "wise the Board's decision—i. e., its assessment—stands

"affirmed; and no notice is afforded the taxpayer before "the making of the Board's assessment, nor any oppor- "tunity to be heard concerning it save that before the "arbitrators. Held, that an assessment so made by the "Board of County Tax Assessors, increasing the valua- "tion returned by a property owner, without notice or "hearing, was without due process of law, where his rem- "edy by arbitration proved abortive because the arbitra- "tors, though agreeing that the assessment was excessive, "could no two of them unite on a new assessment before "the ten day limitation expired."

We contend that an examination of the decisions of this Court pertinent to this case discloses that the following principles of law have been laid down:

First: That "due process of law" requires that at some stage of the proceedings the taxpayer must have an opportunity to appear and be heard *both as to the validity of the tax and as to its amount.*

Second: That the state legislature possesses the authority, by direct legislative enactment, to establish taxing districts and to fix the boundaries thereof without notice to the property owners included within such district.

Third: That where, by direct legislative enactment, certain territory has been formed into a taxing district the taxing authorities of such district may impose special assessments upon the property situated within the taxing district, pursuant to powers conferred by the legislature upon the taxing authorities, without first giving the property owner an opportunity to be heard as to the necessity for the making of the improvement, but in such cases the taxpayer must be given an opportunity to be heard as to the amount of the tax which he is to be compelled to pay.

Fourth: That in cases in which a taxing area or district is not formed by direct act of the legislature but is formed for the making of some public improvement by special assessments upon the property contained in the area or district, by local officers through authority delegated to them by the legislature to act upon petition of property owners, it is *absolutely essential to the validity of the proceedings that notice be given to the property owners whose interests are affected before the taxing area or dis-*

trict can be formed, the work done, and a tax imposed. The notice is not necessarily a personal one and may be by publication *but a notice of some character is essential.*

Analyzing all of the cases upon the subject, there cannot be found a single case in which a law containing the provisions of the South Dakota drainage law has been sustained by the courts. In every instance in which a law has been held valid there was a positive requirement that notice should be given to the taxpayer of a hearing upon the question of the making of the proposed improvements. In every instance the property affected has been definitely determined before the hearing and the property owner has been advised in some manner that his property is included within the area upon which it is intended that a tax or asssesment be imposed.

Search the law reports through; there cannot be found a case in which a mere general notice directed to "all persons affected" has been held to be a sufficient notice to a property owner that his property is to be included within an assessment area.

The inequity of a law like that of South Dakota is well illustrated by the results of the proceedings of the Board of County Commissioners of Minnehaha county in the case at bar. Under a notice to "all persons affected" it is sought to assess for the construction of the works in Drainage Ditch No. 1 and 2 not only the area formerly assessed for the construction of Drainage Ditch No. 1 and for the construction of Drainage Ditch No. 2, but to assess also property situated several miles from any of the work done in Drainage Ditch No. 1 and 2 and miles away from any of the land in the area assessed for the original construction of Drainage Ditch No. 1 or of Drainage Ditch No. 2. Property, that could not by any possibility be drained by the work done in Drainage Ditch No. 1 and 2 and that could not even remotely be benefited by that work, was included in the assessment area, and under the notice there could have been included just as well any other property situate within the limits of the 800 square miles comprising Minnehaha county.

If the County Commissioners of Minnehaha county had been required by the South Dakota drainage law to obtain, in the first instance, a survey and plat of the pro-

posed drainage area, and then to notify, either personally or by mail, publication, or posting, the property owners interested in that area, their proceedings might have had a semblance of legality, but under the South Dakota statute no such procedure is required. The County Commissioners have before them the names of the property owners through whose lands the drainage ditch passes but neither the Board of County Commissioners nor any one else has the slightest idea of what lands will be assessed for the cost of the construction of the drainage ditch. The only notice that is given to anyone is the general notice to "all persons affected." After the drainage works are completed, then for the first time a survey is made for the purpose of ascertaining what lands are "affected" and shall be assessed. The County Commissioners fix the proportion of benefits and publish the notice which, for the first time, informs the property owner that his land is liable for the assessment. It is then too late to lock the barn door. The horse has already been stolen. The drainage project has been constructed, the cost incurred, and all that is left for the property owner to do is to pay his assessment and "look pleasant." We reiterate, that never has a law of this character been sustained by this Court. All decisions of this Court, cited in support of the constitutionality of the South Dakota statute, can be easily distinguished as they are all of them based upon facts and principles of law which are not found in this case.

The bill in this case attacked directly the constitutionality of the South Dakota Drainage Statute. In the District Court the District judge upheld the constitutionality of the statute but granted an injunction upon other grounds (*Chicago, Rock Island & Pacific Railway Co. vs Risty,* 282 Fed. 364). In the Circuit Court of Appeals JUDGE KENYON, in delivering the opinion of the Court, expressly avoided passing upon the constitutional questions involved and while he expressly admitted that these questions were very grave ones, he held that their determination was not necessary to the decision of the case in that court and affirmed on other grounds the decision of the District Court.

Upon this appeal in this court, the constitutionality of the South Dakota Drainage Statute is again brought

before the court by the averments of the bill and answers and by the evidence introduced upon the trial in the District Court and preserved in the record in this Court. The position taken by the Plaintiff and Appellant is, that the South Dakota Drainage Law is in violation of the provisions of the Fourteenth Amendment to the Constitution and while, as will be discussed in a later portion of our argument, we contend that the proceedings taken by the Board of County Commissioners of Minnehaha County were so irregular as to render them invalid even if the statute were constitutional, we now submit, that on account of the unconstitutional provisions of the South Dakota Drainage Law the Board of County Commissioners of Minnehaha County possessed no authority to make assessments against the property of Appellee for the purpose of defraying the costs of the construction of Drainage Ditch No. 1 and 2.

In concluding our discussion upon this branch of this case we submit that the South Dakota drainage statute is unconstitutional in that no notice to property owners is required before a drainage assessment area is established or the work constructed and consequently the statute is unconstitutional as authorizing the taking of property without due process of law, contrary to the fourteenth amendment to the federal constitution.

II.

THE SOUTH DAKOTA DRAINAGE LAW IS IN VIOLATION OF SECTIONS 2 AND 13 OF ARTICLE VI OF THE SOUTH DAKOTA STATE CONSTITUTION AND IS THEREFORE UNCONSTITUTIONAL.

We now come to the question of the constitutionality of the South Dakota drainage law under the provisions of the South Dakota State Constitution. Section 2 of Article VI of the South Dakota Constitution provides as follows:

"§ 2. No person shall be deprived of life, liberty or "property without due process of law."

Section 13 of Article VI of the South Dakota Constitution provides as follows:

"§ 13. Private property shall not be taken for public "use, or damaged without compensation * * * * *"

It will thus be seen that the South Dakota state constitution contains not only the due process of law clause contained in the fourteenth amendment to the federal constitution but also the just compensation clause contained in the fifth amendment to the federal constitution, thus making the provisions applicable to the state which by the fifth amendment are made applicable to the federal government.

The South Dakota drainage statute has a number of times been before the South Dakota supreme court for construction in various of its phases but the question as to the constitutionality of the statute, by reason of its failure to provide a notice to property owners before the assessment area is determined, has never been presented to the South Dakota supreme court or passed upon by that court. Shortly prior to the institution of the case at bar, a suit was commenced in the circuit court of Minnehaha county, South Dakota, by one Oluf O. Gilseth against the Board of County Commissioners of Minnehaha county and other persons, to restrain certain acts with relation to the making of an apportionment of benefits for the construction of the drainage works in controversy in the case at bar. Gilseth, the plaintiff in that case, was a property owner residing upon the flats north of the city of Sioux Falls upon whose land the County Commissioners were attempting to make an assessment. The South Dakota supreme court held that Gilseth was estopped by his actions with respect to the construction of the drainage works from objecting to an assessment to pay for their cost of construction, and the decision appears as *Gilseth vs Risty*, 46 S. D. 374. In the opinion of the majority of the Court, the Court says: "We do not understand that "appellant questions the constitutionality of the law un- "der which the said project was carried out." The Court thereupon proceeds to determine the case under the assumption that the law is constitutional and that the plaintiff, Gilseth, makes no attack upon it. In the dissenting opinion filed by one of the Judges of the Supreme Court of South Dakota in *Gilseth vs Risty*, the question of the constitutionality of the statute is discussed but the opinion

of the majority of the Court decides the case under the express reservation that the question of constitutionality is not involved.

The Supreme Court of South Dakota, in the case of *Evans vs Fall River County*, 9 S. D. 130, stated the law in that jurisdiction in the following language:

"Notice to the taxpayer is a jurisdictional matter, "and his right to be heard in opposition to an assessment, "or to the amount thereof, is vitally essential to the valid- "ity of every assessment. *Black, Tax Titles*, 488; 2 "*Blackw. Tax Titles*, 953; *Cooley, Tax'n*, 227; *County of* "*Santa Clara vs Southern Pac. R. Co.*, 18 Fed. 385; *Pow-* "*ers vs. Larrabee (N. D.)*, 49 N. W. 724; *Bank vs. Maher*, "9 Fed. 884."

From the foregoing citation it will be seen that the Supreme Court of South Dakota recognizes the doctrine laid down by the Supreme Court of the United States to the effect that in a special assessment proceeding the taxpayer must have the right, at some time or other, and in some manner or other, to be heard both as to the validity and as to the amount of the assessment.

The same argument which we have made relating to the unconstitutionality of the South Dakota drainage statute under the fourteenth amendment to the federal constitution applies with equal force to the statute considered in the light of the provisions of the South Dakota constitution.

We therefore contend that the South Dakota drainage law is unconstitutional under the constitution of that State for the reason that no notice is given the property owner of the proceedings precedent to the determination of the boundaries of the assessment area.

Counsel for Appellants argue that the proceedings had in the case at bar are valid for the reason that, as a matter of fact, the drainage notice did contain a description of the property sufficient to give notice to each property owner whose lands were affected. We do not by any means concede that the notice given was sufficient to apprise property owners that their lands were to be subject to assessment for the payment of the cost of the construction of the drainage project, but even if the Board of County Commissioners of Minnehaha county had pub-

lished a notice sufficient for that purpose it would not have helped the situation. The statute does not require any such notice to be published and is consequently unconstitutional. Validity cannot be injected into an unconstitutional and void statute by taking under it the proceedings which would have to be taken under a constitutional and valid status. The law being unconstitutional, all proceedings under it are invalid *ab initio*.

III.

THE LEGISLATURE OF SOUTH DAKOTA HAS NEVER EXERCISED THE AUTHORITY GRANTED TO IT BY SECTION 6 OF ARTICLE XXI OF THE SOUTH DAKOTA CONSTITUTION PROVIDING FOR THE ORGANIZATION OF DRAINAGE DISTRICTS.

To the proper determination of this case, there is necessary a consideration of just what of the powers granted to it by the South Dakota constitution the legislature of that state has attempted to exercise by the enactment of the South Dakota drainage statute. This involves an analysis of the exact phraseology of the constitutional provision under which the legislature obtained its power to act. Section 6 of Article XXI of the constitution constitutes that authority and is as follows:

"§ 6. The drainage of agricultural lands is hereby "declared to be a public purpose and the legislature may "provide therefor, and may provide for the organization "of drainage districts for the drainage of lands for any "public use, and may vest the corporate authorities there-"of, and the corporate authorities of counties, townships "and municipalities, with power to construct levees, drains "and ditches, and to keep in repair all drains, ditches and "levees heretofore constructed under the laws of this "state, by special assessments upon the property bene-"fited thereby, according to benefits received."

The first clause of the foregoing section declares that the drainage of agricultural lands is a public purpose, and gives the legislature power to "provide therefor." This clause is complete in itself and to determine its meaning and intent requires no aid from the remainder of the section.

The section then goes further and gives the legislature authority to "provide for the organization of drainage districts for the drainage of lands for any public use." This is a power conferred upon the legislature distinct and in addition to that contained in the first clause of the section. It gives the legislature authority to establish drainage districts for the purpose, not only of carrying into effect the power to drain agricultural lands, but for the purpose of carrying on any drainage project for "any public use."

As the section stands, when the first and second clauses are considered together, it appears that three things are provided for: (a) the drainage of agricultural lands is made a public purpose, (b) the legislature is given power to provide for the drainage of agricultural lands, and (c) the legislature is given power to provide for the organization of drainage districts for the drainage of land for any public use.

The constitutional section then continues giving to the legislature authority, (a) to vest the corporate authorities of drainage districts with power to construct levees, drains and ditches and keep in repair all drains, ditches and levees theretofore constructed under the laws of the state, by special assessments upon property benefited thereby, according to benefits received, and (b) to vest the corporate authorities of counties, townships, and municipalities with power to construct levees, drains and ditches and keep in repair all drains, ditches, and levees theretofore constructed under the laws of the state, by special assessments upon the property benefited thereby, according to the benefits received.

Throughout the entire section there appears a clear intent to authorize the legislature to proceed in matters respecting drainage of lands in either of two ways, (a) by the organization of drainage districts with corporate authorities, and (b) by empowering the corporate authorities of counties, townships and municipalities with power to enter upon and carry out drainage projects. It is not made obligatory upon the legislature to follow either system for the construction of drainage. The constitution gives the legislature the option to carry on drainage work by drainage districts organized as separate en-

tities, or to carry on the work through the regularly constituted authorities of counties, townships, and municipalities. The legislature of South Dakota, acting under the constitutional option given it by Section 6 of Article XXI of the constitution, has declined to provide for the organization of drainage districts as separate corporate entities, and has provided for the doing of all drainage work through the corporate authorities of the various counties, to-wit, the Board of County Commissioners, county auditor, county treasurer, and other county officers.

It follows that in the case at bar there was not and could not under the law have been formed any drainage districts. The drainage projects, known as Drainage Ditch No. 1, and Drainage Ditch No. 2, and Drainage Ditch No. 1 and 2, were all conceived and carried out by the county authorities of Minnehaha county under the constitutional provision giving the legislature the power to vest in the county authorities the power to construct levees, drains, ditches, etc. The legislature never attempted to exercise the power given it by the constitution to organize drainage districts, and the application of the term "district" to the assessment area of Drainage Ditch No. 1, Drainage Ditch No. 2, or Drainage Ditch No. 1 and 2 is a misnomer. That term is reserved by the South Dakota constitution for an entirely different sort of organization and should not be used in connection with a drainage project carried on by the Board of County Commissioners under the South Dakota statute.

The situation with respect to this matter was pointed out by Judge Elliott in his opinion upon the trial of this case in the District Court. *Chicago, Rock Island & Pacific Railway Company vs Risty*, 282 Fed. 364. In this opinion, Judge Elliott says, (p. 368): "Pursuant to this "provision of the constitution, the legislature of the state "has provided for the drainage of agricultural lands: "*but nowhere is there any statutory enactment under "which drainage districts may be formed for the drain-"age of lands 'for any public use.'*"

A further examination of the particular wording of Section 6 of Article XXI of the South Dakota constitution discloses the important bearing which the failure of

the legislature to exercise the authority of establishing drainage districts has upon the decision of the case at bar. The wording of the constitutional provision is that the legislature "may provide for the organization of drain-"age districts for the drainage of lands for any public use," and may vest "the corporate authorities thereof," etc. Eliminate the quoted words (which are the only ones in the section referring to drainage districts) from the section and the result would be that the section would read, "The drainage of agricultural lands is hereby de-"clared to be a public purpose and the legislature may "provide therefor, and may vest the corporate authori-"ties of counties, townships and municipalities with pow-"er to construct levees, drains, and ditches, etc."

In other words, the South Dakota legislature is given authority to carry on drainage projects either through the formation of drainage districts as corporate entities, or through the municipal authorities of the counties, townships, and municipalities, but while drainage "for "any public use" may be constructed through corporate drainage districts, drainage of lands for agricultural purposes only may also be carried on by the county, townships and other municipal authorities. The constitution nowhere gives the legislature power to provide that drainage for "any public use" other than the drainage of agricultural lands may be constructed by the county, township, or other municipal authorities. Drainage for any other public purpose must be constructed by districts specially organized therefor.

It consequently follows that the legislature of South Dakota cannot, under the provisions of the state constitution, authorize drainage projects, for other than agricultural lands, to be conducted by the county, township, or other municipal authorities. Such authorities may construct drainage projects for the drainage of agricultural lands, but for any other public purposes the works must be constructed by the corporate authorities of drainage districts established for that purpose.

While the legislature of South Dakota had the right, under the state constitution, to enact a law authorizing the Board of County Commissioners of Minnehaha county to construct a drainage project for the drainage of agri-

cultural lands, it could not, under the constitution, authorize the Board of County Commissioners to carry on any drainage project for any public use other than the drainage of agricultural lands.

It follows, therefore, that if Drainage Ditch No. 1 and 2 was initiated by the Board of County Commissioners of Minnehaha county for a purpose other than the drainage of agricultural lands, the Board exceeded their powers in constructing the dams, ditches, spillway, and other works in Drainage Ditch No. 1 and 2, for which Appellee is now asked to pay a proportionate part. The question whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for some other purpose we will discuss in a separate section of this brief.

IV.

DRAINAGE DITCH NO. 1 AND 2 WAS NOT A PROJECT FOR THE DRAINAGE OF AGRICULTURAL LANDS, AND THE ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY IN ENTERING UPON THE PROJECT AND IN CARRYING IT ON WAS *ULTRA VIRES*.

We now come to the consideration of the question as to whether Drainage Ditch No. 1 and 2 was a project for the drainage of agricultural lands or for the carrying out of some other purpose. There are at this time before this court pending appeals in six cases involving Drainage Ditch No. 1 and 2, and there is a divergence of views of the Appellees in various of the six cases as to the status of the drainage proposition. In some of the cases, the Appellees contend that Drainage Ditch No. 1 and 2 was simply a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and that the work was initiated and carried on by the Board of County Commissioners of Minnehaha county as a project for the repairing of Drainage Ditch No. 1 and of Drainage Ditch No. 2. In the case at bar, the position which we take is that Drainage Ditch No. 1 and 2 must be considered as an independent project entered upon by the Board of County Commissioners and that it is not a mere project for the re-

pair of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and is not in any manner controlled by the original proceedings for the construction of the old ditches. We contend that Drainage Ditch No. 1 and 2 must be considered as if it were an entirely new proposition entered upon after the spillway at the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916.

In the bill in this suit, it is alleged that the Board of County Commissioners of Minnehaha county has spent a sum in excess of $255,000 in the construction of a spillway, dams, and retaining gates, "designed not for the "purpose of drainage of agricultural lands, but solely "for the purpose of controlling and retarding the flow "of water, through the outlet of said Drainage Ditches "No. 1 and No. 2 into the Big Sioux river for the pur-"pose of preventing a change in the channel of said river "and of preventing the drainage of the gravel bed through "which the said city of Sioux Falls obtains its water "supply." It is further alleged that less than five per cent of such money has been expended for any purpose legitimately connected with the construction and maintenance of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The bill further sets up the alleged proceedings for the organization of Drainage Ditch No. 1 and 2.

The answer sets up the organization of Drainage Ditch No. 1 and 2 as a separate organization from Drainage Ditch No. 1 and Drainage Ditch No. 2, and the theory of Appellants is that Drainage Ditch No. 1 and 2 was a separate and independent organization and not a mere continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2, and that its formation was compelled for the purpose of saving the water supply of the city of Sioux Falls, and preventing the change of the channel of the Big Sioux river, and the imperiling of the interests of various property owners.

The position of Appellants throughout this case has been that Drainage Ditch No. 1 and 2 was a new and separate organization. They have so pleaded, and with their allegations in this regard we have no contention to make. The Appellee in this case is satisfied to rest this proposition upon the allegations of the answer and to concede that Drainage Ditch No. 1 and 2 was a new or-

ganization and was entirely independent of the original ditches. As we have said, in others of the six cases tried at the same time and upon the same record as this case, the plaintiffs (Appellees in this court) contested the claim of the defendants and intervenors (Appellants in this court) that Drainage Ditch No. 1 and 2 was a new and independent proposition and contended that all of the work done by the Board of County Commissioners was done merely as a continuation of the work upon the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2. JUDGE ELLIOTT, in his opinion filed in the District Court, arrived at the conclusion that Drainage Ditch No. 1 and 2 was not a new and independent organization but was simply a continuation of the old original ditches. *Chicago, Rock Island & Pacific Railway vs Risty*, 282 Fed. 364 (p. 374 *et seq*).

With due respect to the opinion of the learned District Judge (who evidently felt inclined to hold so as not to preclude the holders of the drainage ditch warrants from a right to recover the amount of their investments from the property owners within the original assessment area of the Drainage Ditch No. 1 and of Drainage Ditch No. 2), we respectfully submit, that under the allegations of the bill and answer in this case, and under the evidence contained in the record, Drainage Ditch No. 1 and 2 must be deemed to be a new and independent organization and must stand or fall as such. If it possesses no life of its own, life cannot be injected into it by treating it as a continuation of the old original ditch organizations.

It appears from the evidence in this case that after the outlet of Drainage Ditch No. 1 had been washed out in the spring of 1916, various plans were proposed for the controlling of the water so as to prevent the formation of a new river channel and the draining of the gravel bed, from which the city of Sioux Falls obtained its water supply. No changes in Drainage Ditch No. 1 and Drainage Ditch No. 2 were required for the purpose of draining agricultural lands in the flats north of the city of Sioux Falls. The two ditches were working beautifully, so far as that purpose was concerned. They formed a perfect, complete and satisfactory system for the drainage of the flats. The property owners in the

flats could not have asked for any drainage system more complete. The trouble was, that instead of draining too little, the ditches drained too much, and were too efficient in their operation. No change in them was required for any purpose connected with the drainage of agricultural lands. The only people interested were those who objected to the formation of a new channel for the Big Sioux river and who were interested in maintaining a water supply for the city of Sioux Falls. The change in the course of the river, if made, would have operated to destroy various industries dependent upon the water power at the dams south of the falls. It would also have prevented the flow of the water through the city limits, and would have forced the city of Sioux Falls to seek some other municipal water supply.

The Board of County Commissioners, after various plans had been considered and for one reason after another abandoned, finally formed a new organization under the name of Drainage Ditch No. 1 and 2, and went ahead and expended upwards of $250,000 in the construction of a spillway, retaining walls, retaining dams, ditches, etc. The greater part of the money was invested in a spillway, dam and retaining walls which were purposely intended to retard, rather than to accelerate the flow of the surface water which collected upon the flats north of the city of Sioux Falls, and which consequently were intended to hinder rather than to facilitate the drainage of the flats.

After $255,000 and over had been expended upon the spillway and other water retaining works, the Board of County Commissioners proceeded to make an apportionment of benefits upon the lands "affected" by the improvement. In the assessment area, the Board of County Commissioners included not only the territory which had been included in the assessment area of the original ditches, Drainage Ditch No. 1 and Drainage Ditch No. 2, but also included all of the lands and lots within a considerable distance on either side of the Big Sioux river between the south boundary of the property in the assessment areas of the original ditches, along the channel of the Big Sioux river for a distance of some nine miles, along where the river runs west and south of

the city of Sioux Falls and through the city, and up to a point a short distance north of Sioux Falls. The ostensible reason for the inclusion of all this additional territory was the alleged fact that the property along the river was subject to floods at the time of freshets which would be relieved by the construction of the spillway and other water retaining works. Upon the trial, it was shown that with the exception of a small tract of territory immediately south of the original ditch assessment areas, the remainder of the lands, for a space of eight or nine miles along the channel of the Big Sioux river, had never suffered from flood waters, excepting in the spring of 1881, and that the occasion for the flood in that year was not the collection of water upon the flats north of the city of Sioux Falls, but the forming of an ice gorge at a point in the river in the southeast portion of the city. There was consequently a total lack of any proof in the record that the territory, along the channel of the river and through the city of Sioux Falls attempted to be included in the assessemnt area, was in any manner affected, beneficially or otherwise, by the construction of the spillway and other water retaining works.

In addition, the Board of County Commissioners attempted to proportion "benefits" to the City of Sioux Falls, (this Appellee), the Northern States Power Company (owner of the waterpower on the Big Sioux river above the falls), and upon four railroad companies having railroad tracks and station grounds situated within the attempted assessment area. In the case of Appellee, and of two of the railroad companies sought to be assessed, property was owned both in the assessment areas of the original ditches and in the additional territory attempted to be included within the assessment area of Drainage Ditch No. 1 and 2. The Northern States Power Company and two of the railroads owned property only in the new territory and had no mileage or other property in the original assessment areas. In the decrees entered in the various railroad cases, the District Court enjoined the assessment of the railroad properties not included in the original assessment areas but reserved, without prejudice, the determination of the question whether the

railroad companies having land both in the original assessment areas and in the new assessment area should be held liable for an assessment upon its property in the original assessment area. In the case at bar the decree enjoined any assessment upon all of the property of Appellee.

The question therefore arises whether, under the record in this case, the Board of County Commissioners of Minnehaha county possesses authority to make any apportionment of benefits whatsoever, or any assessment upon any property whatsoever, for the cost of the construction of the works in Drainage Ditch No. 1 and 2. Our contention in this regard is as follows:

It is alleged by the defendants and Appellants in their answer, and Appellee admits it to be a fact, that Drainage Ditch No. 1 and 2 was a new and independent proposition and not a continuation of Drainage Ditch No. 1 and of Drainage Ditch No. 2, and cannot be considered as a proposition for the repair of the original ditches. It is a project which must stand or fall upon its own footing.

Under the evidence in this case, Drainage Ditch No. 1 and 2 was not a project for the drainage of agricultural lands but was a project for another "public use," to-wit, the preservation of the water flowage in the channel of the Big Sioux river and of the supply of water in the gravel bed from which the city of Sioux Falls obtains its water supply. Neither of these propositions involves the drainage of agricultural lands. Drainage Ditch No. 1 and Drainage Ditch No. 2 had completely accomplished the object of draining the flats north of the city of Sioux Falls. If those drainage works were damaging other property interests, the remedy for the persons interested was to have the ditches abated as nuisances. Instead of pursuing this course, the Board of County Commissioners of Minnehaha county entered upon the construction of an elaborate system of water retaining works by which the water, which was collected from the flats into Drainage Ditch No. 1 and Drainage Ditch No. 2, could be retained until it could be passed off gradually into the Big Sioux river. To have abated Drainage Ditch No. 1 and Drainage Ditch No. 2 as nuisances, would have been to permit

the water, accumlating upon the flats, to remain there until it could flow off through its natural channel around the bends in the Big Sioux river, the same as it did before Drainage Ditch No. 1 and Drainage Ditch No. 2 were constructed. Instead, however, of doing this, the Board of County Commissioners proceeded to construct a new water retaining system by which the water could be retained upon the flats until it could gradually be drawn off, partly through the natural channel of the river and partly through a restricted passageway formed by the spillway and its attendant retaining walls and dams. In other words, the Board of County Commissioners proceeded to spend $250,000 and over for the purpose of accomplishing the same object that could have been accomplished by damming up the original ditches and leaving the flats in the same condition that they were before the original ditches were constructed. While some evidence was introduced, tending to show that a portion of the water collecting upon the flats passed off through the spillway, it remained in the evidence almost uncontradicted that the situation in the flats above the city of Sioux Falls is as bad as it was before any drainage ditches were constructed.

From all of the evidence in the record in this case, it would appear that the construction of the spillway and other works, under the organization of Drainage Ditch No. 1 and 2, was not for the purpose of draining agricultural lands but was for an entirely different purpose. This is the conclusion to which JUDGE ELLIOTT came in his opinion in the District Court, and upon this subject JUDGE ELLIOTT says, *Chicago, Rock Island and Pacific Railway Company vs. Risty*, 282 Fed. 364 (p. 378):

"There is another and further suggestion: I am of "the opinion that this reconstruction of the old spillway "without change of location, the repair of the break from "the river into the ditch, the cleaning of the ditch, the "change of the headgates where the flood waters are "taken from the river, everything that was done under "this pretended establishment of a new ditch, could not "have been viewed in the same light or as serving the "same purpose as the construction of the original ditches,

"because the thing that caused the board of commis-
"sioners to take any action with reference to the condi-
"tion that then existed was the danger that existed be-
"cause of the conduct of the water down through these
"two drainage ditches to and through this spillway. The
"danger that was threatened was not that the agricultural
"lands would not be drained, but that immense damage
"was threatened, that the course of the river was to be
"diverted to this cut-off, that great areas of land were
"threatened to be cut away by this river 100 feet deep,
"and that the water supply of the city was threatened
"to be taken away because of this drainage ditch and
"this imperfect spillway, because the water was to be
"taken from the river and all of the benefits of the river
"for several miles, through and around the city of Sioux
"Falls, would be destroyed. The power of the Northern
"States Power Company would be destroyed, by taking
"the water from the river. If it had not been for those
"conditions, for these threatened dangers, no action would
"have been taken; the ditches would have continued to
"function as they had functioned before. If the spill-
"way had been properly constructed originally, and if it
"had not proven inadequate, there would have been no
"cause for any action by the board in the year 1916.
"Every consideration that impelled action by the board
"was some phase of the threatened danger by reason
"of the inadequate and imperfect construction of these
"two ditches. Neither of these considerations that in-
"fluenced the action of the board *had anything to do with*
"draining agricultural lands."

As has been shown, the legislature of South Dakota has never passed an act, putting into effect the authority vested by the constitution in the legislature to create drainage districts. As has also been shown, while drainage of agricultural lands can be carried on by county, township, and other municipal authorities, drainage for other "public uses" can only be constructed by drainage districts through their corporate authorities. It appearing from the record in this case that the work done under the organization of Drainage Ditch No. 1 and 2 was not for the purpose of agricultural lands but for other "public uses," it follows that the Board of County

Commissioners of Minnehaha county exceeded its authority in attempting to organize Drainage Ditch No. 1 and 2 and to construct the spillway and attendant works. Upon this proposition, JUDGE ELLIOTT, in his opinion, says:

"It may be said that to remedy these wrongs consti-
"tuted a public use, as referred to in the constitution of
"the state of South Dakota. Admitting that that is true,
"we are confronted with the proposition that there has
"been no legislation, conforming with the provisions of
"the constitution, authorizing the legislature to provide
"for the establishment of drainage districts and in the
"naming of officers with the powers therein referred to.
"If, therefore, any claim were made that the commis-
"sioners were acting under this authority, independent
"of the provision of law with reference to the drainage
"of agricultural lands, the answer is that the provision
"of the constitution is not selfexecuting, and that no leg-
"islation has been provided carrying this provision of
"the constitution into effect."

We therefore submit, that as the construction of the spillway and other attendant works was not a project for the drainage of agricultural lands, and as drainage for public uses other than the drainage of agricultural lands can, in South Dakota, only be carried on by the corporate authorities of drainage districts, and as the legislature of South Dakota has never authorized the organization of drainage districts with corporate authorities, all of the acts of the Board of County Commissioners of Minnehaha county, in attempting to organize Drainage Ditch No. 1 and 2, and in constructing the spillway and attendant works under such organization, were *ultra vires*, and that no apportionment of benefits or assessment for the cost of such construction can be made upon the property of Appellee.

V.

THE SOUTH DAKOTA DRAINAGE LAW IS UNCONSTITUTIONAL, SO FAR AS RESPECTS ASSESSMENTS OF THE PROPERTY OF APPELLEE, IN THAT IT PROVIDES FOR THE GIVING OF NO NOTICE WHATEVER OF THE APPORTIONMENT

AND EQUALIZATION OF BENEFITS TO MUNICIPALITIES.

In the preceding discussion of the South Dakota drainage law, we have considered the subject of the notice required by the statute to be given to property owners in general. We now desire to call the attention of the court to the provisions (or want of provisions) in the statute, relating to the notice to be given to railroad companies and to municipalities.

So far as concerns the statutory provisions relating to the notice to be given before a drainage project is entered upon by the Board of County Commissioners under the South Dakota drainage law, there is no difference as respects railroads, municipalities and other property owners. The only notice, as has been seen, is a general notice to all persons "affected" by the proposed drainage project.

When we come to the matter of the notice given for the equalization of benefits, a singular situation is presented by the provisions of the statute in, that while the law provides for the publication of a notice to the owners of land, there is no provision whatever for the publication of any notice to railroad companies and to municipalities.

The provisions respecting the notice to be given of the equalization of proportion of benefits is found in Section 8463, South Dakota Revised Code, 1919. This section was evidently originally drafted for the purpose of providing a method for the equalization of assessments upon agricultural lands. The method, provided by the statute, for arriving at the assessment and equalization of benefits, is to take some "particular tract as a unit" and then with this tract as a measuring stick to determine, in number of units, the benefits received by the remaining tracts of land. This system is one which is in its nature applicable to agricultural lands, but which cannot well be applied to other classes of property, such as railroads and the property of municipalities. In the case of railroads, the taking of a particular tract of land as the unit, or measuring stick cannot be made to work out successfully unless the taxing authorities are content to assess railroads merely by virtue of the railroad

ownership of the tracts of land comprised in the right of way within the assessment area. In other words, the only way in which the proportion of benefits to railroad property could be determined, under the system provided by the statute, would be to consider merely the area of the right of way and proportion benefits to it the same as to the other agricultural land within the assessment area. So too municipalities can only be assessed by virtue of the ownership of land within the assessment area.

Evidently the legislature, in enacting the South Dakota drainage law, was not satisfied to have railroad companies and municipal organizations pay assessments for the construction of drainage works upon the same basis as the owners of agricultural lands, and in enacting Section 8463, South Dakota Revised Code, 1919, after providing the method for the assessment of the proportion of benefits upon lands by selecting some particular tract as a unit, there was added to the Section (something in the nature of an afterthought) the clause, "the pro-"portion of benefits which any county, city, town or "township may obtain by the construction of such drain-"age to highways or otherwise, and *the benefits which "any railroad company may obtain for its property by "such construction,* shall be fixed and equalized together "with the proportion of benefits to tracts of land." No method of arriving at the assessment and equalization is provided by the statute. The "particular tract as a unit" system is selfevidently inapplicable in such cases but the legislature has provided nothing to take its place. The law gives the Board of County Commissioners the naked power to fix and equalize the proportion of benefits to counties, cities, towns, townships, and railroad companies, but provides no method upon which the assessment and equalization can be based.

The notice of equalization of proportion of benefits, provided by Section 8463, "shall state the route and "width of the drainage established, a description of each "tract of land affected by the proposed drainage and the "names of the owners of the several tracts of land as "appears from the records of the office of the Register of "Deeds, at the date of the filing of the petition, and the

"proportion of benefits fixed for each tract of property, "taking any particular tract as a unit, and shall notify "all such owners to show cause why the proportion of "benefits shall not be fixed as stated." This is a notice directed solely to the owners of tracts of land within the assessment area. It does not purport to be a notice to a county, city, town, township, or railroad company respecting the assessment or the equalization of proportion of benefits upon the property belonging to any of such organizations. The statute authorizes the Board of County Commissioners to assess the "proportion of benefits" which any county, city, town or township may obtain by the construction of drainage to highways or otherwise, but does not provide for the giving of any notice to the municipality affected.

The fact, however, remains that the legislature of South Dakota has made no provision whatever for the giving of notice to railroad companies, cities, towns, or townships, of the assessment or equalization of benefits supposed to be derived from the construction of the drainage works. It consequently follows that as far as railroad companies, counties, cities, towns, and townships are concerned, the statute provides for no notice whatever, at any stage of the proceeding, of the assessment or of the tax. Even if the South Dakota drainage statute should be held valid as far as respect the matter of notice to the owners of agricultural lands, it is clearly unconstitutional as to railroads and municipalities by reason of its failure to provide for any notice whatever at any stage of the proceedings. It clearly comes within the inhibition of the Fourteenth Amendment and within the doctrine laid down by the Supreme Court in numerous cases.

Central of Georgia Railway Company vs Wright, 207 U. S. 127,
Londoner vs Denver, 210 U. S. 373,
Soliah vs Heskin, 222 U. S. 522,
Turner vs Wade, 254 U. S. 64

The South Dakota drainage statute having failed to provide for the giving of any notice, at any stage of the proceedings prior to the time the tax becomes absolute,

to railroad companies or municipalities, any assessment or tax imposed upon each corporation or municipality under the statute is without due process of law and void.

VI.

THE ATTEMPTED ASSESSMENT UPON THE PROPERTY OF APPELLEE WAS ARBITRARY, UNJUST, AND ILLEGAL, AND CONSTITUTES A DISCRIMINATION SO PALPABLE AND ARBITRARY AS TO AMOUNT TO A DENIAL OF THE EQUAL PROTECTION OF THE LAW.

Under the proposed assessment of benefits, out of a total of 32,549.62 units there were assessed against Appellee 3145.95 units, upon which the assessment of Appellee would be in excess of $29,900. The methods used by the Board of County Commissioners in arriving at these figures is disclosed by the testimony of H. Rettinghouse, a civil engineer employed by the Board of County Commissioners to make a survey of the assessment area, and who made the computations contained in the assessment of benefits adopted by the Board. Mr. Rettinghouse was called by Appellants as a witness and upon the trial testified (Record pp. 271-280), as follows:

"We used this unit selected as one and compared "the other real estate with it. It was decided by the "Board that the acre in question was worth one hundred "dollars prior to the improvements and that it was "worth one hundred twenty-five dollars subsequent to the "improvements. Therefore the actual value of benefit "to the unit selected was twenty-five dollars. All the "agricultural land was assessed in relation to this unit. "Many of the lands were only 30 or 40 per cent depend-"ing upon the amount of benefit derived, as compared "with this unit, being one hundred per cent. There were "other lands that were as high as three hundred and fifty "per cent of this unit. I am familiar with the cost of "construction and upkeep of highways. In arriving at "the benefit to the highways within this drainage area "we estimated the benefit in this way. There is a certain "amount of annual maintenance necessary for any road, "and there is more than that amount under flood con-

"ditions. That is to say, a road that is periodically "flooded as against a road that never is flooded. The "difference in the estimated cost of maintenance was "capitalized, or represented the interest on a certain "sum of money, and we consider the capitalized portion "as a real benefit. We then, after obtaining that re- "sult after making a great many calculations, taking "into consideration the various locations, some of them "benefitted more than others.

"We divided the amount arrived at by the value of "the unit of $25, thereby obtaining the number of units "as a proportional benefit for these roads. The sum "we divided by the unit represented the capitalized value "to that part of the highway; we applied the same "method to the streets and highways of the City of "Sioux Falls. We did not apply the acreage basis to "the city property, excepting possibly the grounds where "the waterworks are located. In applying the benefit "to the unit and what the Board took into consideration "as elements of benefit to the Milwaukee Railway Com- "pany, we took into consideration the fact that in the "first place there were practically three elements. First "was the right-of-way on the acreage basis, which was "estimated in proportion to the adjacent lands. Second, "that it was possible to shorten or abandon certain "bridges. In order to determine the benefits derived "therefrom is simply a mathematical proposition. It "costs a certain amount of money each year in order "to maintain a bridge, whether it is a pile bridge or a "steel bridge. We know how long these structures will "last. We figure the cost of a bridge and divide it by "the number of years in order to get the amount that "is necessary to be expended each year for replace- "ment. Taking the amount in dollars and cents multi- "plied by the length of the bridge and divide that and "capitalize that at 7 per cent, which is the usual rate "of interest, and that determines the amount of benefit. "This is the second element. The third element is "the fact that by reason of the flooding of the territory "in which railroads are located, washouts often occur. "We obtained data and from my personal knowledge and "experience I have a very good idea what it costs to re-

"pair washouts periodically appearing and we estimated "as close as possible how much it would amount to every "year and capitalized that amount again.

"Again as an additional element, a road-bed is solid-"ified or made stronger by not being subject to floods. "A road-bed that is constantly or for great lengths of "time subjected to submersion is certainly weakened, "and again, so far as humanly possible, we figured the "amount of benefits in dollars and cents and after get-"ting all of these results or capitalized amounts, we di "vided that by twenty-five as our measure and determined "the number of units of benefit. That system and general "method and plan was used to determine the amount "of benefits that each railroad received from these "separate elements."

The statement of Mr. Rettinghouse, the engineer who made the assessment of benefits for the Board of County Commissioners of Minnehaha county, is upon its face sufficient to demonstrate the fact that in arriving at the proportion of benefits to be assessed against Appellee, the Board used as a basis for arriving at the assessment a method so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. The assessment was clearly upon a fanciful view of benefits to be derived by Appellee from the drainage project. The basis used was not authorized by any provision of the South Dakota drainage law but was evolved from the inner consciousness of the County Commissioners of Minnehaha county and of the civil engineer employed by them. The basis was so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. It constituted a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law.

We do not deem it necessary to discuss this proposition at further length. In the recent case of *Kansas City Southern Railway Company vs Road Improvement District No. 6*, 256 U. S. 658, this Court has emphatically condemned similar methods of assessment.

We respectfully submit, that even if the South Da-

kota drainage were constitutional and there were no other valid objections to the proceedings of the Board of County Commissioners of Minnehaha County in the organization of Drainage Ditch No. 1 and 2, and in the construction work done thereunder, the assessment made upon Appellee cannot be sustained for the reason that it is so arbitrary and unjust and so confessedly founded upon a fanciful basis as to deprive Appellee of the equal protection of the law.

VII.

THE DISTRICT COURT POSSESSED JURISDICTION TO ENTERTAIN AND DETERMINE THIS SUIT.

Counsel for Appellants have filled a great portion of their brief with arguments upon objections to the jurisdiction of the District Court in this suit. We do not deem it necessary to take up these various objections and discuss them *seriatum*. The questions at issue, involving as they do the constitutionality under the Federal Constitution, together with the amount involved and the diversity of citizenship, are amply sufficient to sustain the jurisdiction of the court.

Counsel for Appellants strenuously contend that Appellee should have waited until after the Board of County Commissioners of Minnehaha county had finished the equalization of benefits before instituting this suit. This case is, however, not one in which any such delay of proceedings was necessary. The law, under which the Board of County Commissioners was proceeding, was unconstitutional. The Board was a trespasser from the very commencement of the assessment proceedings. After the Board of County Commissioners had committed one illegal act, in making the assessment of benefits, it was certainly not incumbent upon Appellee to wait before instituting legal proceedings until after the Board had committed further illegal acts. Jurisdiction to maintain a suit to restrain the commission of a tort becomes fixed as soon as the first tortuous step has been taken by the tort feasor. It is not necessary for the person injured

to wait until after the threatened damage has been completed. The Board of County Commissioners of Minnehaha county invaded the rights of Appellee when it made the assessment of benefits, and the right of action then became complete.

In our view of the issues involved in this case, the points which we have raised in the foregoing discussions in this brief are a sufficient answer to all questions concerning the jurisdiction of the court.

VIII.

APPELLEE IS NOT ESTOPPED BY ITS ACTS FROM MAINTAINING THIS SUIT.

In their brief, counsel for Appellants make a somewhat elaborate attempt to show that Appellee is estopped from maintaining this suit. It is conceded that Appellee is a municipal corporation. It further appears both from the pleadings and from the evidence that the washing out of the outlet to Drainage Ditch No. 1 in the spring of 1916 threatened to divert the water flowage in the Big Sioux river to a new channel which would cut off about nine miles of the natural river channel where it flows through the city of Sioux Falls, and would also operate to drain the gravel bed on the flats north of the city of Sioux Falls from which the city obtains its municipal water supply. It must consequently be conceded that the city of Sioux Falls was vitally interested from a municipal standpoint in the drainage situation in the areas drained by Drainage Ditch No. 1 and Drainage Ditch No. 2.

It also appears from the evidence in the case that on August 3, 1916, there was filed in the office of the city auditor of the City of Sioux Falls a certain petition signed by F. L. Blackman and other persons, and that this petition was signed by the mayor and city auditor of the city of Sioux Falls on its behalf. (Record pp. 41-46. 246-247.)

It further appears from the evidence that the Blackman petition, executed by Appellee by its mayor and city auditor, was the petition used by the Board of County Commissioners of Minnehaha county upon which they

based their proceedings in the organization of Drainage Ditch No. 1 and 2.

The contention of Appellants is that because Appellee was one of the petitioners who signed the Blackman petition, Appellee is estopped from making any complaint with respect to the establishment of Drainage Ditch No. 1 and 2, or objecting to the regularity of the proceedings taken by the Board of County Commissioners.

We concede the general principle of law that where a man asks to have a certain thing done he cannot afterwards complain because his request has been complied with. Our contention in this case is, however, that, under the record made upon the trial in the district court and now before this court, it does not appear that Appellee ever petitioned for or consented to the action taken by the Board of County Commissioners in establishing Drainage Ditch No. 1 and 2, and in constructing a spillway, retaining walls, dams, and other works under that organization.

A man may be estopped from complaining because the thing has been done which he has requested to be done, but there is no rule of law by which a man is estopped from objecting to the doing of an act which he has not requested, simply because he made a request that another and different act be performed. The mak ing of a request to a public officer, or board to perform a certain act within the scope of the official power of the officer, or board does not give carte blanche for the performance of the act in a wholly illegal manner. Public officials are to be presumed to act in accordance with the authority conferred by law upon them, and no one is bound to take notice of the fact that a public officer or board will act irregularly or illegally in any matter lawfully brought before him or it.

There is also a very clear distinction to be drawn between acts which constitute an estoppel as to an act to be done in the future and those which constitute an estoppel after full notice of the act having been done. A man, by accepting the benefits of an illegal act, may preclude himself from raising the question of the illegality of the act, but there is no principle of law by which a man is estopped from complaining of an illegal act to be

done in the future and, especially when the act alleged to constitute the estoppel is done without any knowledge of an intended illegal performance of a lawful duty.

If, after Drainage Ditch No. 1 and 2 had been organized and $255,000 expended by the Board of County Commissioners in the construction of the spillway, dams, retaining walls, and other works, Appellee had approved the acts of the Board of County Commissioners with full knowledge of their illegality, and had accepted the benefits of them, it might have placed itself in a position in which it would be estopped from objecting to the illegality of the acts of the Board of County Commissioners. No such situation appears in the record. The only estoppel proven is the signing of the Blackman petition on behalf of the Appellee. There is nothing in the record to show that Appellee by any act subsequent to the construction of the drainage works in Drainage Ditch No. 1 and 2 condoned the illegal acts of the Board of County Commissioners or in any manner estopped itself from complaining of them.

As a matter of fact, the Board of County Commissioners of Minnehaha County did not comply with the petition of Appellee and the other petitioners in the organization of Drainage Ditch No. 1 and 2. The petition is set out in full in the record. (Record pp. 43-46). This petition asked for the reconstruction and improvement of Drainage Ditch No. 1 and Drainage Ditch No. 2, and the construction of a spillway at the outlet of these ditches. The petition set forth in extenso the route of Drainage Ditch No. 1 and Drainage Ditch No. 2 and of the proposed additions thereto.

The Board of County Commissioners, on August 3, 1916, passed a resolution for the filing of the petition and the transmission by the county auditor of a copy to the state engineer. (Record pp. 46-47.) On August 14, 1916, The Board of County Commissioners adopted a resolution for a survey of the 'proposed drainage.' (Record p. 48.) On September 13, 1916, the Board passed a resolution 'fixing the exact line and width of ditch and fixing the time and place for hearing of petition.' On September 15, 1916, the Board made a 'drainage ditch notice' returnable October 2, 1916, (Record pp. 53-63)and on October 3,

1916, the Board adopted a resolution 'establishing Drainage Ditch No. 1 and 2.' (Record pp. 50-53.)

An examination of these proceedings of the Board of County Commissioners discloses the fact that the Blackman petition, which was the one signed by Appellee, was a petition to 'reconstruct and improve' Drainage Ditch No. 1 and Drainage Ditch No. 2, and to 'construct a new spillway or outlet to said drainage ditches.' It was not a petition for the organization of a new and separate ditch organization. All that Appellee and the other petitioners had in mind at the time the petition was signed was to have Drainage Ditch No. 1 and Drainage Ditch No. 2 repaired so that Drainage Ditch No. 1 at its outlet would not continue washing a new channel for the Big Sioux river through the bluff, thereby diverting the river flowage from its natural channel and draining the underlying gravel bed. There was no intention whatever upon the part of Appellee and the other petitioners to ask for the formation of a new, separate, and independent drainage organization.

In organizing Drainage Ditch No. 1 and 2, the Board of County Commissioners proceeded further than the Board was authorized to do by any petition which was before them for action. In signing the Blackman petition, Appellee had a right to rely upon the Board proceeding in a legal manner and had no notice of the fact that the Board, instead of acting under the petition and repairing Drainage Ditch No. 1 and Drainage Ditch No. 2, as requested in the petition, would attempt to organize an entirely new drainage proposition. Appellee is consequently not estopped from complaining of the action of the Board of County Commissioners in this regard.

The Blackman petition, as signed by Appellee and presented to the Board of County Commissioners, provided for the repair and improvement of Drainage Ditch No. 1 and Drainage Ditch No. 2. These ditches were organizations for the draining of agricultural lands, a purpose within the jurisdiction of the Board of County Commissioners. The proposition fathered by the Board in the organization of Drainage Ditch No. 1 and 2 was for an entirely different purpose and was intended for the protection of the various persons, corporations, and

municipalities interested in the preservation of the natural flowage of the Big Sioux river and in the conservation of the water supply in the gravel bed from which the city of Sioux Falls obtained its municipal water supply. This might be termed a 'public use' but under the South Dakota constitution drainage works for a public use other than the drainage of agricultural lands could only be carried on through the corporate authorities of a regularly organized drainage district. Such a project was beyond the powers of the Board of County Commissioners. In establishing Drainage Ditch No. 1 and 2 the Board of County Commissioners consequently acted ultra vires, and Appellee is not estopped from complaining of such action.

It will also be noticed that the Board of County Commissioners paid absolutely no attention to the request of the petitioners in the Blackman petition in establishing the drainage routes in Drainage Ditch No. 1 and 2, and the routes specified in the surveyor's report are different from those outlined in the petition, while the routes adopted by the resolution of the Board do not conform either to the routes specified in the petition or those outlined in the report of the surveyor. After Drainage Ditch No. 1 and 2 was formed and the Board of County Commissioners proceeded with the construction work, it relegated to the scrap pile the petition, the surveyor's report and the resolution establishing Drainage Ditch No. 1 and 2, and proceeded to construct ditches along lines entirely different from those set forth in either the petition, the surveyor's report, the drainage ditch notice, or the resolution establishing Drainage Ditch No. 1 and 2. All of these acts were without the consent of Appellee, and it can scarcely be said that it estopped itself from complaining of them because it signed the Blackman petition asking for making of repairs on Drainage Ditch No. 1 and Drainage Ditch No. 2.

A further answer to the estoppel plea is this: Under the South Dakota drainage law, no notice was required to be given Appellee until the assessment of benefits had been made. Up to that time, Appellee had no knowledge that its property, situated outside of the original assessment areas of Drainage Ditch No. 1 and of

Drainage Ditch No. 2, was 'affected' by the drainage construction, or would be assessed for the cost thereof. We do not concede that, under the South Dakota statute, any notice was ever given to Appellee that an assessment had been made upon its property for the statute, as had been seen, does not provide for the giving of any notice whatever to railroad companies or municipalities. If, however, it should be conceded, for the sake of argument, that the notice published by the Board of County Commissioners, after the assessment had been made, was a notice to Appellee, it was the first notice that Appellee had ever received. All of the acts under which an estoppel is claimed by Appellants were done during the time of the construction work and long prior to the making of the assessment of benefits and to the publishing of the equalization notice.

We respectfully submit that even if the acts set forth in the record were sufficient to constitute an estoppel upon the part of Appellee that such acts could not constitute an estoppel for the reason that, at the time they were done, Appellee had received no notice that its property within the new territory sought to be assessed was within the assessment areas of Drainage Ditch No. 1 and 2, and had no knowledge that an assessment was in contemplation. We deem it unnecessary to discuss the estoppel proposition at further length.

IX.

IN CONCLUSION

In the record of this case there is ample evidence of the greatest ignorance, ineffeciency, and extravagance upon the part of the Board of County Commissioners of Minnehaha county in the construction of the spillway, retaining walls, dams, and other works under the organization known as Drainage Ditch No. 1 and 2. Plans for the work were adopted and then the adoption rescinded. Plans and specifications for the construction of a spillway were obtained and bids advertised for and received for the construction in accordance with the plans. The bids were rejected upon the ground that they were too high, the plans were then thrown into the waste basket and contractors were employed to construct a spillway upon

the cost-plus plan, the contractors to receive compensation for the material and labor used and, in addition, a profit of nine per cent. The construction of the spillway was entered upon without any plans therefor being made, and the plans were drawn after the spillway had been completed, or practically completed. The cost of the spillway so constructed was approximately $150,000, or more than three hundred per cent of the amount of the bids which were rejected by the Board as being too high. The spillway and other works, when completed, have failed to accomplish successfully the drainage of the flats north of the city of Sioux Falls. The property owners in the flats are in practically the same, or possibly in a worse condition, than they were prior to the original construction of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The works constructed, under the organization of Drainage Ditch No. 1 and 2, simply operate to retain the surface water upon the flats and not to drain it off. They are successful in preventing the diversion of the channel of the Big Sioux river and in preventing the draining of the gravel bed from which the city of Sioux Falls obtains its water supply. Those two objects have successfully been accomplished but the same results could have been attained by placing, at a trifling expense, earthwork dams in proper places along the course of Drainage Ditch No. 1 and of Drainage Ditch No. 2. The spillway and other works, as completed in Drainage Ditch No. 1 and 2, have operated to destroy the efficiency of the original ditches as drainage propositions, but have accomplished nothing that could not have been accomplished at a trifling expense by simply abandoning the old ditches and preventing the flow of water through the bluff and into the Big Sioux river below the falls.

The Board of County Commissioners of Minnehaha county, in the work done by them on Drainage Ditch No. 1 and 2, seem to have acted at haphazard and without any well defined plan of procedure. The one thing which they have accomplished successfully has been to expend upwards of $250,000 upon works which are useless as a drainage proposition, and, with interest, the entire indebtedness which has now accumulated is in excess of $300,000. The intervening Appellants, who hold

the drainage ditch warrants issued by the Board of County Commissioners of Minnehaha county upon Drainage Ditch No. 1 and 2, are certainly in an unfortunate position. That they are in a fair way to lose their investment is, however, no reason why Appellee, an "innocent bystander," should be "made the goat" and forced to pay for the errors, mistakes, and wild extravagances of the Board of County Commissioners of Minnehaha county. It was not through any fault of Appellee that Drainage Ditch No. 1 and 2 was organized and the spillway and other works constructed. It is in no manner responsible for the acts of the Board of County Commissioners or for the mistakes of judgment of the intervening Appellants, in investing in the warrants.

In conclusion, we submit, that for the reasons which we have hereinbefore set forth, the South Dakota drainage law is unconstitutional under both the federal and the state constitutions; that the proceedings under which Drainage Ditch No. 1 and 2 was organized were illegal and void; that the work done under such organization was without authority of law; that the attempted assessment upon the property of Appellee is founded upon a fanciful, arbitrary, and illegal basis; that the District Court possessed jurisdiction to hear and determine this suit; and that, for these and the other reasons hereinbefore set forth, the decree of the District Court and the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

PROVISIONS OF SOUTH DAKOTA CONSTITUTION

SECTION 2 OF ARTICLE VI.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

SECTION 13 OF ARTICLE VI

§ 13. Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained, and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

SECTION 6 OF ARTICLE XXI

§ 6. The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby, according to benefits received.

APPENDIX B

SOUTH DAKOTA DRAINAGE STATUTES

(NOTE: The section numbers at the beginning of each paragraph are those of the South Dakota Revised Code of 1919. The references at the end of each paragraph are to the Session Laws of the various years. The paragraphs as printed constitute the law as it stood at the time of the transactions involved in this suit.)

§ 8458. POWER OF COUNTY COMMISSIONERS. The Board of County Commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural land. (§ 1, ch. 98, 1905; § 1, ch. 134, 1907).

§ 8459. PETITION. Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. The petition shall be accompanied by a bond with sufficient sureties to be approved by the county auditor, conditioned to pay all expenses incurred in case the board does not grant the petition or the same is denied on appeal. Such petition may be presented at any regular or special meeting of the board, and, if sufficient in form, shall be ordered filed with the county auditor. (§ 2, ch. 98, 1905; § 2, ch. 134, 1907).

§ 8460. INSPECTION OF PROPOSED ROUTE. It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners shall as soon as practicable, inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and

assessment of its cost, or as much less as the board may require. Such survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. For the purpose of inspection or surveys, the county commissioners, surveyors or their employes may enter upon any lands traversed by the proposed drainage or in their judgment likely to be affected thereby. The county auditor shall promptly furnish the state engineer with a copy of the surveyor's report mentioned in the succeeding section and of all maps and plans filed by such surveyor and also with a copy of such further files as the state engineer may ask for. In case the drainage is established the preparation of plans and specifications upon which the contract of construction is to be awarded and also the work of construction, shall be under the supervision of the state engineer. It shall be the duty of the state engineer to render such assistance and advice to the board of county commissioners in regard to such drainage as the duties of his office will permit and he shall be reimbursed by such board for his expenses incident thereto; provided, that in case of minor ditches the state engineer shall not be required to attend with the board of county commissioners at the first inspection, nor to perform subsequent services if in his judgment it shall not be necessary for him so to do. (§ 3, ch. 98, 1905; § 3, ch. 134, 1907; § 1, ch. 102, 1909).

§ 8461. SURVEYOR'S REPORT — NOTICE OF HEARING. The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall de termine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route

of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing. (§ 4, ch. 98, 1905; § 4, ch. 134, 1907; § 2, ch. 102, 1909).

§ 8462. HEARING ON PETITION. At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. After full hearing the drainage may be established along the line set forth in the petition or in the finding of the board prior to the hearing, or the board may vary the route thereof, or its width, as deemed practicable or necessary. If the board deems it best to vary the route, or to materially change the initial or terminal points of such proposed drainage so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing. No open ditch shall be constructed within the limits of any public highway except where the topography of the country makes such construction advisable and in such case the ditch shall be located at a sufficient distance from the center of such highway to permit a roadway of standard width being constructed. If the proposed drainage does not give sufficient fall to drain the lands sought to be drained or will not properly take care of the waters collected by

such drainage, the same shall be extended so as to secure the drainage or properly dispose of the water. The hearing in any such case shall be adjourned and notice given to all parties newly affected as in case of the original hearing. When the board of county commissioners shall have fully heard and considered such petition, and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition, the petitioners to be jointly and severally liable for the costs of the proceeding, the same to be recovered in a civil action. If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimants right to have the same assessed by the jury. Such drain shall be given a name and the proceeding thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office. (§ 5, ch. 98, 1905; § 5, ch. 134, 1907; § 3, ch. 102, 1908; § 1, ch. 205, 1917).

§ 8463. EQUALIZATION OF BENEFITS. After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the

board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed. (§ 6, ch. 98, 1905; § 6, ch. 134, 1907; § 4, ch. 102, 1909).

§ 8464. ASSESSMENTS. After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. The cost of establishment shall include the costs of the service of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all other expenses incurred or to be incurred that in any way contributed or will contribute to the establishment or construction of the drainage. At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same

will be so filed, by publication at least once each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the state and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at a rate not to exceed eight per cent per annum payable annually. Such assessment shall be paid to and received by the county treasurer and paid over to the holders of the assessment certificates or upon the order of the board of county commissioners. The board of county commissioners may issue separate assessment certificates against each tract assessed for the amount of the assessment thereon, and may sell the same at not less than par value with all accrued interest, or may contract to pay for the construction of such drainage with such assessment certificates or with warrants. Such assessment certificates shall refer to the record in the office of the county auditor of the order of assessment and of the filing of a copy thereof in the county treasurer's office, shall transfer to the holder all interest, claim, or right in or to such assessment, bear the same rate of interest, carry the lien of such assessment and be enforcible as provided by law. Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale, provided that no such assessment or installment thereof shall be included in the sale of any

given year unless the same shall have been delinquent on or before August first of each year. The provisions of Chapters 7, 8, 9, Part 9 of this title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable, except that a treasurer's deed issued upon a delinquent drainage assessment shall recite the fact that the title conveyed is subject to all the claims which the state or any political subdivision thereof may have thereon for annual taxes.

Whenever an assessmnet for drainage or an installment thereof has been made against any county, city, town or township, as provided in this chapter, the officers of such county, city, town or township, whose duty it is under the law to make the levy of taxes, shall at the time of the next annual tax levy after the making of such assessment make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment, and return the same to the proper officers as provided by for the other taxes, and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes; provided, that any surplus remaining in any fund at the close of any year may be used by any township to pay and apply on any drainage assessment, as provided herein; provided, further, that in unorganized townships the county commissioners shall be authorized to pay for drainage as provided herein out of any money belonging to such unorganized township, and each succeeding year a like levy shall be made by such authorities until the whole of such assessment for drainage is paid. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at a rate not to exceed eight per cent per annum payable annually, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and cost of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage. (§ 7, ch. 98, 1905; § 7, ch. 134, 1907; § 5, ch. 102, 1909;

ch. 130, 1911, and as amended by § 1, ch. 46, Laws of Second Special Session of the Sixteenth Session of the Legislature of South Dakota 1920).

§ 8465. BIDS—SPECIFICATIONS—CONTRACTS. Whenever sufficient money shall have been collected the damages occasioned by the construction of such drainage and fixed as herein provided shall be paid and thereupon the board of county commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same. Such contracts may require the contractors to take their pay in assessment certificates or in warrants to be thereafter issued. The contract may be for the construction of the entire drainage or for any portion thereof, and shall be let upon competitive bids, the board reserving the right to reject any and all bids. The lowest responsible and capable bidder shall be accepted but if any landowner affected be an equally low, capable and responsible bidder with a nonowner of the lands affected the former shall be preferred. When any contract shall be let the contractor shall give a bond in such sum as shall be approved by the board of county commissioners, conditioned for the faithful performance of his work and full completion of his contract to the satisfaction of such board. For the information of the contractors in bidding upon the proposed drainage, full plans and specifications shall be filed in the office of the county auditor. If in the judgment of the board of county commissioners the entire drainage or any part thereof can be constructed for less money than the amount of any bid submitted therefor, the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary material for such construction, without letting contracts therefor. Contracts for building bridges or culverts rendered necessary by the construction of such drainage may be let separately and after the drainage is completed. The cost of constructing such bridges or culverts shall be charged in the first instance as part of the cost of drainage and thereafter such bridges and culverts shall be maintained as part of the highway; provided, that the cost of removing, repairing, enlarging or replacing bridges and culverts already existing across the line of a proposed drainage ditch shall

not be charged as a part of the drainage. (§ 8, ch. 98, 1905; § 8, ch. 134, 1907; § 6, ch. 102, 1909; ch. 206, 1917).

§ 8466. BOARD MAY EXTEND TIME FOR COMPLETION OF CONTRACT. The board of county commissioners shall have power to grant a reasonable extension of time for the completion of any contract. When any contract shall not be finished within the time specified or to which it may be extended, such board may in its discretion at any time thereafter relet such unfinished portion of any part thereof after not less than five days' notice thereof to the lowest responsible bidder and shall take security as for the original contract. The cost of completing such parts, over and above the original contract price and the expense of notices and reletting, shall be collected by the board from the first contractor; provided, that in no case shall the board forfeit and annul a contract without five days' notice to the contractor, if found, and if not found then by written notice left at his last known place of residence in the county. (§ 9, ch. 98, 1905; § 9, ch. 134, 1907).

§ 8467. ASSESSMENTS FOR FURTHER COSTS. At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessments and certificates. The board of county commissioners may sell such assessment certificates at not

less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage. (§ 10, ch. 98, 1905; § 10, ch. 134, 1907; § 7, ch. 102, 1909).

§ 8468. ACCEPTANCE OF DRAINAGE BY BOARD. After the work of construction shall have been fully completed and approved by the state engineer, the drainage may be accepted by the board of county commissioners, by order duly made, and payment shall be made therefor unless in the discretion of the board of county commissioners agreement be made for the partial payments; provided, that final payment shall not be made until the expiration of thirty days after the acceptance of the work and in case an appeal has been taken from the order accepting such work final payment shall not be made until the determination of such appeal; provided, further, that no payment shall be made to any engineer whose employment has not been approved by the state engineer, and no payment shall be made upon any contract for the construction of any such drainage project, unless the same shall have been constructed under the supervision of the state engineer; and provided further, that nothing in this section shall apply to minor drainage projects. All claims for compensation or expenses for publishing legal notices or supervising the construction of any such drainage project including the per diem and the mileage of the county commissioners, shall be paid from the general fund of the county, and for all such payments the county treasurer shall reimburse the general fund from the assessments herein provided for. (§ 11, ch. 98, 1905; § 11, ch. 134, 1907; § 8, ch. 102, 1909; ch. 207, 1917).

§ 8469. APPEALS. An appeal shall lie for any final order or determination of the board of county com-

missioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage to the circuit court of the county in which such drainage is located by any one deeming himself aggrieved by any such order or determination. Written notice of such appeal shall be served upon the board of county commissioners and a bond conditioned to pay all the costs of such appeal, in case the contention of appellant be not sustained in some respect, shall be filed in the office of the clerk of courts, to be approved by him in such amount and with such sureties as he deems necessary. Upon the service of such notice and the filing of such bond, the county auditor shall transmit to the clerk of courts the petition and all other papers and records in the matter or certified copies thereof, when the convenience of the auditor's office would be seriously impaired by the transmission of the original records, and such matter shall be heard as an original action in the circuit court. No appeal shall operate as a stay of proceedings by the board of county commissioners, but the court may upon the taking of an appeal, for good cause shown issue an order staying the further proceedings by the board of county commissioners until the hearing and determination of such appeal. Before granting such stay, the court shall require an undertaking in sufficient amount and with sufficient surety to the effect that if the order appealed from be sustained the person upon whose motion the stay is granted shall pay all damages caused by the issuance of such order of stay. Any number of persons interested may join in the same appeal. Appeals shall be in all cases taken within thirty days from the making of the order or determination appealed from. If, on the trial of such action, it be determined that the drainage as petitioned for and established by order of the board is not conducive to the public health, convenience or welfare or is not necessary or practicable for the purpose of draining agricultural lands, the petitioners shall be jointly and severally liable for all the costs thus far incurred. If the contention of the appellant as to the amount of damages or proportion of benefits, the acceptance of the drain-

age, of the practicability of the drainage when the route thereof is varied by the county commissioners over the protest and objection of the petitioners, be sustained in whole or in part, the costs of such trial shall be part of the cost of the drainage. Upon an appeal from an assessment of benefits, the court of jury shall consider not only the relative benefits, to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not; if benefited, to what extent. (§ 12, ch. 98, 1905; § 12, ch. 134, 1907; § 9, ch. 102, 1909).

§ 8470. ASSESSMENTS FOR MAINTENANCE. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportion determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and assessments and certificates shall be liens, interest-bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance or may be collected directly by the board of county commissioners. (§ 13, ch. 98, 1905; § 13, ch. 134, 1907).

§ 8471. ASSESSMENTS PAID IN INSTALLMENTS. The owner of any tract of land against which an assessment for drainage is made, who shall, within thirty days after the making of such assessment, file with the county auditor an agreement in writing that in consideration of the right to pay his assessment in installments he will not make any objections to the illegality or irregularity of his assessment, if any there be, and will pay the same with interest as fixed by the board of county commissioners, shall have the privilege of paying such assessment in ten annual installments, interest payable annually. Assessment certificates shall not issue until after the expiration of the period of filing such agree-

ments with the county auditor, and when issued for assessments to be payable in installments may be issued in coupon form. The first installment shall be payable within ten days after a certified copy of the assessment has been filed, in the office of the county treasurer, and subsequent installments shall be payable one, two, three, four, five, six, seven, eight and nine years from the date of such assessment, respectively, with interest on the whole sum unpaid payable annually at maturity of the several installments. Such subsequent installments shall become delinquent after the expiration of thirty days from the time the same are payable and thereupon a penalty of five per cent shall attach thereto. Provided, that where bonds shall have been issued for the construction of such drainage, as provided in Section 8472, such assessments shall be made payable in installments sufficient to meet the payment on the bonds, as the same shall become due. Payments of assessments may at any time be received and full discharge thereof given by the county treasurer to any property holder, but after issue of bonds, such payment of assessments can be received only according to the terms of such bonds. (§ 14, ch. 98, 1905; § 14, ch. 134, 1907; § 10, ch. 102, 1909).

§ 8472. BOARD MAY ISSUE BONDS. The board of county commissioners, whenever it has ordered the establishment of any drainage, shall have authority by resolution to be spread upon its records, to provide for the issuance of bonds in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in obtaining the right of way or in locating or constructing any such drainage. Such word "expenses" shall be construed to mean and cover every item of cost of such drainage from its inception to its completion, such bonds to be payable only out of the funds to be derived from special assessments upon the lands benefited thereby. Such bonds shall bear interest at a rate not exceeding 7% per annum, payable annually and be payable not exceeding twenty years from issue. Such bonds shall be signed by the chairman of the board of county commissioners and countersigned by the auditor, who shall keep a record of all such bonds. Such bonds shall be issued for the benefit of the particular drainage,

numbered, recorded and indexed in the office of the county auditor, and shall in no case be issued for a sum exceeding the benefits to the lands affected by such drainage. The board of county commissioners shall have the power to negotiate such bonds at not less than par value, as it may deem best for the interest of all persons affected by such drainage, any premium received on such bonds to be credited to the fund of the particular drainage. Such bonds shall contain a recital that the same are issued pursuant to the authority of this article and that they are to be paid out of the funds to be obtained as herein provided. Assessments shall be made upon all of the lands benefited by such drainage for the payment of the principal and interest of such bonds when the same shall become due. Such assessments may be made by separate assessments for installments of interest and principal or in one proceeding with but one set of notices. When the assessments are finally fixed the same shall be certified to the county treasurer by the county auditor, and the money paid in thereon shall be received by the county treasurer and paid over to the holders of such bonds. Separate funds shall be kept by the treasurer for each drainage project, and no funds for one drainage project shall be applied to any other drainage. No county shall be liable for the payment of any bonds issued under this article, but such bonds shall be paid only out of the funds derived from the special assessments herein provided for. Such bonds may be made payable at such times as the board of county commissioners shall find for the best interests of the persons benefited by the drainage, and may be issued for all or any portion of the expenses of such drainage. (§ 15, ch. 98, 1905; § 15, ch. 134, 1907).

§ 8474. FURTHER POWERS OF BOARD. Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as in all

lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly. (§ 17, ch. 98, 1905; § 17, ch. 134, 1907).

§ 8475. DITCH OR DRAIN MAY BE DECLARED NUISANCE. Any ditch, drain or watercourse, which is now or may hereafter be constructed so as to prevent the sufrace and overflow water from adjacent lands from entering the same is hereby declared a nuisance and may be abated as such. (§ 18, ch. 98, 1905; § 18, ch. 134, 1907).

§ 8476. POWERS DEFINED. The powers conferred by this article for establishing and constructing drains shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed, also to straightening, cleaning out and deepening the channels of creeks and streams and constructing, maintaining, remodeling and repairing levees, dykes and barriers for the purpose of drainage; and the board of county commissioners may relocate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made, but no proceedings affecting the rights of persons or property shall be had under this section except upon notice and the other procedure prescribed herein for the construction of drains. (§ 19, ch. 98, 1905; § 19, ch. 134, 1907).

§ 8477. DRAINS UNDER CHARGE OF COUNTY COMMISSIONERS. All drains that have been constructed under any law of this state, or that may be constructed under the provisions of this article, shall, except as otherwise specifically provided, be under the charge of the board of county commissioners and be by it kept open and in repair. In all cases when any completed drain is or may be situated in more than one county, the care of the portion thereof lying within any county is assigned to the board of county commissioners of such county to be

kept open and in repair. The cost of such repairs shall in all cases be assessed, levied and collected in the same manner as provided in this article for the construction of drains originally and in all cases when no assessments of benefits shall have been made, the board of county commissioners having charge of such drain shall make such assessments. (§ 20, ch. 98, 1905; § 20, ch. 134, 1907).

§ 8478. BOARD MAY MAKE RULES AND REGULATIONS. The board of county commissioners may make such rules and regulations on the subject of drainage as it may deem proper, not inconsistent with the provisions of this article, and especially with regard to clearing out and keeping clear the channels of streams and the construction and maintenance of dams thereupon, with reference to their capacity for drainage. (§ 21, ch. 98, 1905; § 21, ch. 134, 1907).

§ 8482. DRAINS FOR TOWNS AND CITIES. The board of county commissioners shall have authority to establish drainage for or including the whole or any part of any city or incorporated town, including cities acting under special charter, as provided in this article, and it shall have the same authority with respect to the assessment of damages and benefits within such city or town as in other cases provided for in this article, and like notices to such city or town with respect to the establishment of such drainage and the apportionment and assessment of damages and benefits shall be given as is required by this article to be given to the owner of property damaged or benefited by the establishment or construction of such improvement. (§ 24, ch. 98, 1905; § 24, ch. 134, 1907).

§ 8485. COMPENSATION OF COUNTY COMMISSIONERS. The county commissioners shall receive for their services four dollars per day for the time actually spent by them in the performance of the duties of their offices under this chapter, publishers of newspapers shall receive for publishing legal notices the same fees as are allowed by law for publishing proceedings of the county commissioners; but the proceedings of the board of county commissioners when acting in any drainage matter under this article shall not be published as a part of its regular proceedings or at all. The county auditor shall charge a reasonable amount, to be fixed by the

board, for services, to be paid into the general fund of the county. Each county commissioner shall have power to administer any oath required in any drainage proceeding. (§ 27, ch. 98, 1905; § 27, ch. 134, 1907; § 11, ch. 102, 1909).

§ 8486. NOTICES, HOW SERVED. Notice by personal service, as of a summons in a civil action, may be given instead of by publication and posting in all cases where notice is provided for in this article. In any case where notice is required under the provisions of this article and any person affected by the drainage has not been notified, either by publication or personally, and a hearing has been had or determination made, such person may be notified personally or by publication and posting, to show cause at a time and place to be fixed by the board of county commissioners, and to make return or claim damages as in case of the original hearing. Any such omitted person may be brought in on such due notice at any stage of the proceeding, or after it has been otherwise concluded. The enforcement of any assessment shall not be enjoined for want of the notice provided for in this article, except pending an application to the board of county commissioners for the determination of such matters as to which any person deems himself not bound because of want of notice. (§ 28, ch. 134, 1907).

§ 8488. DEFECTS IN PROCEEDINGS DISREGARDED. Any defect or irregularity not affecting the substantial rights of parties interested, occurring in any drainage proceeding, shall be disregarded in any action seeking to avoid an assessment or cancel, annul or declare void any such proceeding. And in case the defect is substantial the court shall of its own motion determine the rights of the parties, validate the proceedings and assess the costs as justice may require, if the court shall find cause for such validation or such action should have been taken in the first instance and all parties interested are before the court. (§ 29, ch. 98, 1905; § 30, ch. 134, 1907).

§ 8489. INVALID OR ABANDONED PROCEEDINGS. If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned,

or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate thereform, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (§ 33, ch. 134, 1907).

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 456.

A. G. RISTY, ET AL., AS COUNTY COMMISSIONERS, ETC., ET AL., PETITIONERS

vs.

GREAT NORTHERN RAILWAY COMPANY, RESPONDENT.

STATEMENT AND BRIEF IN RESISTANCE OF PETITION FOR CERTIORARI

Believing that if the court is fully and correctly informed with reference to the questions involved in this case it will not deem such questions of sufficient importance or of such nature as to induce it to exercise its power in certiorari, we respectfully ask consideration of the following in resistance of the petition for certiorari filed therein.

STATEMENT OF CASE

The Big Sioux River flows from the north in a southerly direction west of the city of Sioux Falls to a point southwest of the city, thence easterly and thence northerly through the city to a point where it is intersected by the outlet of the drainage ditch or ditches in controversy.

Respondent owns and operates a line of railroad which enters the city of Sioux Falls from a northeasterly direction, extends south through the city, and runs thence southwesterly to the city of Yankton. The point on its line nearest to the drainage ditches hereinafter referred to is about one and one-

half miles south of their outlet, and south of what is hereinafter referred to as the spillway.

In or about the years 1907 to 1909, petitioners caused to be constructed what was then known as Drainage Ditch No. 1, having its origin at a point about three and one-half to four miles north of the city of Sioux Falls, and emptying into the Big Sioux River at a point one and one-half miles north of respondent's railroad.

While the proceedings for the construction of Drainage Ditch No. 1 were pending a petition was filed for the construction of what was first known as Ditch No. 2. Subsequently another petition was filed, seeking the extension of proposed Ditch No. 2, and praying that it be made a part of Ditch No. 1. Petitioners finally, by resolution, established and caused to be constructed Drainage Ditch No. 2, having its origin at a point approximately fifteen miles north of the outlet of Ditch No. 1 on the east side of the Big Sioux River, and running thence in a southerly direction, intersecting the Big Sioux River at one point, and so close to the river at other points that the river subsequently cut into the ditch, and connecting with and emptying into Ditch No. 1 at its point of origin.

Petitioners, by resolution, determined that all of the property theretofore included within what they had determined to be the area of Drainage Ditch No. 1 was also benefited by Drainage Ditch No. 2; that the two ditches were mutually interdependent and should virtually be considered as one drainage system, and they assessed all of said property for the construction of both ditches. The system of drainage thus established was completed and paid for by assessment upon the property then deemed to be benefited which did not include any property lying south of the outlet of Ditch No. 1. No part of respondent's property was included within the drainage area thus established; it was given no notice of any kind of the establishment of such drainage and no attempt was made to include its property within the drainage area or assess it for any part of the cost of the drainage.

As originally constructed, and after the connection of Drainage Ditches No. 1 and 2, the outlet of Drainage Ditch No. 1 consisted merely of a concrete apron hereinafter referred to as "spillway," extending from the lower terminus of Drainage Ditch No. 1 down over an abrupt slope to the Big Sioux River at a point below the falls of the river and as heretofore stated north of respondent's line of railroad. In the year 1916, the volume of water passing through Ditches No. 1 and No. 2 washed out a portion of this concrete work with the result that the waters in the spillway were at that point uncontrolled and serious damage was threatened by the continued maintenance of the ditches in the absence of properly constructed works for the purpose of controlling and confining the waters at their outlet. It is conceded that with the ditches

in the condition in which they were after the washing out of the spillway there was great danger that the Big Sioux River would be diverted from its course around the city of Sioux Falls and caused to flow through the ditches from the point of intersection some miles north of the city returning to the river at the point where the old spillway was located below the falls, thus threatening to destroy the water power of the Northern States Power Company, the water supply of the city of Sioux Falls, and seriously damage many other properties and rights.

It appears from the answer and the undisputed evidence that petitioners started work of some character to attempt to control the waters at the spillway and to prevent the threatened damage; that certain property owners within the area theretofore determined to be benefited by the drainage objected to this work and instituted suit in the state court to restrain the same; that thereafter a petition was filed with petitioners seeking a change of the outlet of the Drainage Ditches No. 1 and No. 2 in such manner as to discharge the water from said ditches into what is known as Covell's Lake, situated in the northwesterly part of the city of Sioux Falls; that thereafter the owners of property within the drainage area as theretofore determined and the parties interested in the Covell's Lake project had numerous conferences with reference to the matter; that as a result of such conferences and as a compromise between said parties (there being no contention or proof that respondent was a party thereto) the proceedings held under the petition last referred to were abandoned and a petition know as the petition of F. L. Blackman and others was filed, which petition is entitled "Petition to Reconstruct and improve Drainage Ditches No. 1 and 2 in Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby." Upon this petition, confessedly filed and acted upon by petitioners as a compromise between the owners of property within the drainage area and the promoters of the so-called Covell's Lake project, and not including respondent, petitioners adopted a resolution providing for its hearing and caused notice of said hearing to be published. Respondent was not named in said notice; its right of way, tracks, embankments and bridges were not referred to, and no part of its property was described. It contained nothing which could be construed as giving any notice whatever to it that any claim would be made of benefit to its property or that any attempt would be made to assess its property in such proceeding.

Upon the return day of such notice, petitioners adopted a resolution purporting to re-establish Drainage Ditches No. 1 and No. 2 under the name of Drainage Ditch No. 1 and 2,

along the exact course of their previous construction and for the re-construction of the outlet or spillway.

Purporting to act under this resolution, petitioners caused Ditches No. 1 and No. 2 to be cleaned and otherwise repaired and caused the outlet or spillway thereof to be re-constructed, and pursuant to a resolution or resolutions thereafter adopted, without any notice to respondent, caused certain portions of the Big Sioux River to be straightened. The spillway was re-constructed under the cost plus plan without advertising for bids for its re-construction in accordance with the plans finally adopted, and warrants were issued for the cost of such work amounting, with interest, to approximately $300,000.00.

The first intimation contained in the record of any thought of assessment of or attempt to assess any part of respondent's property appears in a notice published in April, 1919, said notice being of a hearing upon the matter of equalization of benefits resulting from said Drainage Ditch No. 1 and 2 and in which certain depot grounds owned by respondent were described and attempted to be apportioned benefits to the extent of a very few units. Petitioners did not at that time, however, attempt to assess the right of way, tracks, embankments and bridges of respondent and such right and property were not referred to in the April, 1919, notice. Proceedings under this notice were abandoned.

Subsequently and in or about the month of July, 1921, petitioners adopted a resolution apportioning the benefits derived from said Drainage Ditch No. 1 and 2 and apportioned to respondent and to its right of way, tracks, embankments and bridges benefits to the extent of 613.85 units, amounting, as will appear from a mathematical calculation, to approximately $5,800.00. This suit was instituted for the purpose of restraining petitioners from proceeding further with the equalization of said purported benefits and from spreading an assessment upon respondent's property therefor.

The district court acquired jurisdiction both by virtue of well pleaded federal questions and because of diversity of citizenship.

Respondent predicated its claim that the entire proceedings of petitioner commissioners were void upon the following contentions:

1. That the South Dakota drainage ditch statutes were violative of the Fourteenth Amendment to the Federal Constitution;

2. That the acts of the petitioners were so arbitrary and discriminatory as to deprive it of the equal protection of the laws, and that such acts were, therefore, in violation of the Federal Constitution;

3. That the acts of the petitioners in attempting to increase the drainage area of Drainage Ditches No. 1 and No. 2, and to assess respondent's property, not included in such area as originally established, were void because not done pursu-

ant to or authorized by any statutes of the state of South Dakota;

4. That the proceedings of petitioners in attempting to create a new drainage proposition and a new drainage area were a mere subterfuge resorted to by them pursuant to agreement between them and the owners of property in the original drainage area for the purpose of enabling them to assess respondent's property for the cost of such repair and maintenance of the original ditches as was necessary in order to enable them to function without damage to or destruction of the property and rights of respondent and others.

The district court decided that the South Dakota drainage statutes were not violative of the Fourteenth Amendment to the Federal Constitution, but found, in substance, as follows:

1. That the forming of the so-called new ditch was simply a pretense and subterfuge resorted to by petitioners for the sole purpose of attempting to burden respondent and others with the cost of the maintenance of the ditches theretofore constructed;

2. That the South Dakota statutes did not authorize the assessment of property not included within the drainage area of the ditches in question, as originally determined, for the maintenance of such ditches after they had been constructed and the benefits therefor had been assessed, and that the proceedings of the petitioners in so far as they purported to affect the property and rights of respondent were, therefore, void;

3. That the statutes of the state of South Dakota in so far as they purport to authorize drainage proceedings for any purpose other than the drainage of agricultural lands were in conflict with the constitutional provision of the state of South Dakota requiring the corporate organization of drainage districts as a condition precedent to drainage proceedings for any such other purpose, and further found that the proceedings in question, if treated as new proceedings resulting in the establishment of a new ditch, were void because the work done pursuant to such proceedings was not done for the purpose of draining agricultural lands, and that such proceedings were, therefore, not authorized by the state statutes or Constitution; and

4. That regardless of whether or not the alleged new drainage district had been legally constituted, respondent was entitled to the relief asked because of the arbitrary and discriminatory acts of petitioners, bringing respondent within the rule expressed in the case of *Thomas, et al. v. Kansas City Southern R. R. Co.*, 67 L. ed. 758.

C. R. I. & P. Ry. Co. v. Risty et al. 282 Fed. 364.

The Circuit Court of Appeals did not pass upon the Federal constitutional questions involved because, although finding them "grave, serious and doubtful," it deemed their determination not necessary "to the solution of the case," but in other respects it approved the decision of the district court,

and affirmed the decree restraining assessment of respondent's property lying outside the drainage area as originally established.

Risty et al. v. C. R. I. & P. Ry. Co. 297 Fed. 710.

BRIEF

We believe the foregoing statement, which in all respects is sustained by the record, is all that is necessary to present to the court in support of our suggestion that the importance and nature of the questions involved are not such as to demand the exercise of its power in certiorari. We desire, however, to briefly consider the proposition, apparently chiefly relied upon by petitioners, that the decision of the Circuit Court of Appeals has created a conflict between itself and the decisions of the Supreme Court of the State of South Dakota.

We assume that this court will not find that such conflict exists as to demand the exercise by it of the extraordinary power under consideration unless it clearly and conclusively appears: first, that the nature of the questions involved in this case is such that the decisions of the highest court of this state with reference to them will be regarded as authoritative by this court, and second, that such questions have been so decided by the state court as necessarily to foreclose respondent of such rights and remedies as the Federal courts have held it entitled to.

We shall not discuss the first of these two essentials because one of the questions involved, to-wit: as to whether or not the drainage statutes in so far as they purport to authorize drainage for a purpose other than the drainage of agricultural lands, are in conflict with the state Constitution, is of such nature, while the others are as clearly not. None of such questions, however, has been so passed upon by the Supreme Court of the state as to create any conflict.

The state court has never had before it for determination the question as to whether or not the drainage statutes, in so far as they purport to authorize drainage proceedings for any purpose other than that of draining agricultural lands, are violative of the state Constitution. In all cases in which the constitutionality of the statutes has been passed upon by that court the only questions involved were those with reference to the drainage of agricultural lands, and the court very correctly held that such drainage might be provided for without the incorporation of drainage districts.

The case of *Gilseth v. Risty*, 193 N. W. 132, decided after the decision of the district court in this case, is chiefly relied upon by petitioners as establishing the alleged conflict between the state and Federal courts. The opinion in that case discloses the following situation: plaintiff was the owner of agricultural land within the drainage area of Drainage Ditches No. 1 and No. 2 as originally constructed; he was a party to the conferences alleged by respondent in this case to have taken place between the parties interested in the original

ditch proceedings, which conferences resulted in the filing of the petition "for the re-establishment of Drainage Ditches No. 1 and 2;" he was present at the hearing upon that petition and took no appeal from the order of the county commissioners purporting to establish the new drainage; his property, as we have said, was in the drainage area as originally established and he was one of the parties responsible for the original construction of the ditches in question and for their proper maintenance, and one of the parties for whose benefit petitioners are attempting to assess respondent's property and that of others outside the original drainage area.

The court simply held that as to him, a party to the proceeding, the order establishing the drainage and subsequent orders from which he did not appeal, became final. A careful analysis of the opinion discloses that the court finally based its conclusion upon questions of estoppel and lack of equity in favor of plaintiff. After reciting the situation practically as above stated, it said: "Appellant having stood by and seen all the work performed without protest, and having received all the benefits that could result therefrom, should not now be permitted to escape payment for the same. The relief asked by appellant is equitable in its nature, but because of the circumstances above shown, all the equities of the case are against appellant and in favor of the board."

We submit that nothing that was actually decided in the *Gilseth* case is in conflict with the decision of the Circuit Court of Appeals with reference to the rights of respondent here. There is nothing in the *Gilseth* case which would preclude any able lawyer from conscientiously advising respondent that the questions upon which its rights depend have not been passed upon by the state court.

Respondent had no property within the original drainage area; it was not a party to the original proceedings; it was not named nor any of its property described or referred to in the proceedings resorted to for the purpose of enlarging the drainage area.

No constitutional question or question of the power to assess property outside the original drainage area was involved in the *Gilseth* case, and there could not have been a decision in that case, based upon the facts as disclosed by the opinion, that would even furnish any assistance to another court in determining respondent's rights here. The Federal courts, in seeking to avoid conflict, are certainly not obliged to follow the dicta of state courts or give any effect to unnecessary or unessential statements in their opinions.

We respectfully submit that the writ of certiorari should not be granted.

F. G. DORETY,
St. Paul, Minnesota.

HAROLD E. JUDGE,
Sioux Falls, South Dakota.

Solicitors for Respondent.